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No. _____

In The

Supreme Court of the United States

October Term, 1991

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the use of the All Writs Act by a district court to impose obligations created by a consent decree upon one who was never joined as a party nor given notice as to the potential loss of his rights under the decree violate the Legislative-Power, Judicial-Power, Supremacy and Due Process clauses of the Constitution?

2. Does the All Writs Act empower a district court to enforce a consent decree against non-parties which displaces Congress' legislative scheme for adjudication of unfair labor practices before the National Labor Relations Board?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Yellow Freight System, Inc. ("Yellow Freight" or "Yellow"), respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Second Circuit (A1) is reported at 948 F.2d 98. In an unpublished order dated December 31, 1991 the United States Court of Appeals for the Second Circuit denied Yellow Freight's Petition for Rehearing (A101). The opinion of the United States District Court for the Southern District of New York entered April 3, 1991, is not reported. (A36) By order of this Court the date filing the Petition for Writ of Certiorari was established as May 29, 1992 (A103).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 14, 1992. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

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[1] Petitioner is a wholly-owned subsidiary of Yellow Freight System, Inc. of Delaware.

Article II, Section 1, Clause 1 provides, in pertinent part:

> The executive power shall be vested in a President of the United States of America . . .

Article II, Section 3 provides, in pertinent part:

> . . . he shall take care that the laws be faithfully executed . . .

Article III, Section 2, Clause 1 provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, The Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

Article VI, Clause 2, provides, in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby . . .

The Fifth Amendment

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation.

The statutory provisions involved in this case are Sections 7, 8 and 10(a) of the National Labor Relations Act, 29 U.S.C. §§157, 158 and 160(a), the Racketeering Influenced and Corrupt Organizations Act, 29 U.S.C. §1961, 1962 and 1964, and the All Writs Act, 28 U.S.C. §1651(a). These statutes, or pertinent parts thereof, are reproduced in the Appendix at A114-A119.

STATEMENT OF THE CASE

This controversy is one of several claims against non-parties which grew out of a civil action alleging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968, against defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("IBT"), its General Executive Board and officers, La Cosa Nostra, individuals allegedly involved with the La Cosa Nostra and/or the IBT.[2] Neither Petitioner Yellow nor any other employer of IBT members was named as a party nor mentioned in the Complaint. Yellow was not notified of the RICO action, and did not participate during any stage of the litigation.

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[2] The litigation between the United States and the IBT has resulted in the following reported decisions involving the IBT, and/or its members and affiliated local unions: *United States v. IBT*, 709 F.2d 1338 (S.D.N.Y. 1989); *United States v. IBT*, (All Writs decision), 728 F.Supp. 1032 (S.D.N.Y. 1990), *aff'd*, 907 F.2d 277 (2d Cir. 1990); *United States v. IBT* (Election Rules Order), 742 F.Supp. 94 (S.D.N.Y. 1990); *United States v. IBT* (Friedman & Hughes), 725 F.Supp. 162 (S.D.N.Y. 1989), *aff'd*, 905 F.2d 610 (2d Cir. 1990); *United States v. IBT* (Affiliated Local Unions), 723 F.Supp. 203 (S.D.N.Y. 1989), *aff'd* 931 F.2d 178 (2d Cir. 1991); and *United States v. IBT* (Senese & Talerico), 745 F.Supp. 908 (S.D.N.Y. 1990) (appeal on remand from Independent Administrator), 753 F.Supp. 1181 (S.D.N.Y. 1990), *aff'd*, 941 F.2d 1292 (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3376 (U.S., Feb. 24, 1992) (No. 91-717).

The following reported decisions arising out of this litigation involve other non-party employers: *United States v. IBT* (Commercial Carriers), 950 F.2d 94 (2d Cir. 1991); *United States v. IBT* (Star Market), 776 F.Supp. 144 (S.D.N.Y. 1991), *aff'd*, 954 F.2d 801 (2d Cir. 1992), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S., Apr. 21, 1992) (No. 91-1674); and *United States v. IBT* (Sikorsky Aircraft), 955 F.2d 171 (2d Cir. 1992).

On March 14, 1989, United States District Judge David Edelstein entered an Order approving a Settlement Agreement ("Consent Decree") between the parties. (A69) In part, the Settlement Agreement provided for the conduct and supervision of the 1991 IBT election of officers. It called for the appointment of an Election officer and Administrator who, pursuant to their authority under the Settlement Agreement, promulgated Election Rules. (A69, 104) *See, United States v. International Brotherhood of Teamsters*, (Appeal of Affiliated Locals), 931 F.2d 177, 180-182 (2nd Cir. 1991).

Nowhere does the Settlement Agreement purport to apply to non-party employers. Nevertheless, employers' rights were determined in their absence by the promulgation of the Election Rules, specifically Article VIII, §10(d), which provides:

> No restrictions shall be placed upon candidates' or members' pre-existing rights to use *employer* or union bulletin boards for campaign publicity. Similarly, no restriction shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund-raising events or engage in similar activities on *employer* or union premises. Such activities shall be made equally available on the same basis to all candidates and members. (A105) (Emphasis supplied)

The Election Rules, Article XI, §2(g), further provide that the Election Officer upon finding a violation of the Rules may take "whatever remedial action appropriate" including "requiring or limiting access" to employer or union premises. (A113)

The present dispute arose in late 1990 when non-party complainants Patrick Clement, Robert McGinnis and Mike Hewer, three IBT members not employed by Yellow, were refused access to Yellow Freight's property to campaign for the upcoming union elections. Yellow's

denial was based on its pre-existing no-solicitation policy which provided:

> There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting. (A7)

Yellow's enforcement of its no-solicitation policy resulted in the above-mentioned complainants filing protests with the Election Officer. (A84-97) Specifically, Yellow was cited with violating Article VIII, Section 10(d), of the Election Rules, denying non-employees the right to campaign upon its property. The Election Officer interpreted the Election Rules in the broadest possible fashion. Rather than reading a member's "pre-existing rights," as a "reference to rights of access previously recognized by employers through contract or past practice or decreed by enforcement orders of the National Labor Relations Board" – a reading which "accords with the language used in the Consent Decree and limits the rights of access conferred by the Decree to rights enjoyed by the IBT that the IBT may lawfully confer upon IBT members" – "employer" was read as any employer, not being limited to the employer of the complainants, and "pre-existing rights" were read to mean any rights which existed under federal labor law, i.e., the National Labor-Relations Act ("NLRA"). (A28, Winter, J. dissenting)

In short order, the Election Officer, (A61) the Administrator, (A46) and the district court, (A36) held that Yellow was subject to the Election Rules, and to the jurisdiction of the Election Officer and Administrator, and that Yellow's exclusion of non-employees, Clement and McGinnis, from its property violated the Election Rules.

On February 14, a divided panel of the Second Circuit held:

(a) that the All Writs Act permitted the court and its; appointed officers, the Election Officer and Administrator to order non-employee campaigning on Yellow's property;

(b) that the National Labor Relations Board did not have exclusive jurisdiction over complaints of denial of access to employer premises; but

(c) the election officer had erred on the merits of the protest by misapplying the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

The Second Circuit decision in this case stands two centuries of American jurisprudence on its head. The exact holding of *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803), was that the power of the federal judiciary to issue writs is limited by the Constitution. The exact holding of the Second Circuit was that a court's power to issue writs is no longer fixed by the Constitution but rather by the nature and extent of a consent decree – a private agreement between the parties. Never before has any court sanctioned a settlement of claims arising under one statute which directs a private tribunal to hear and determine claims of non-parties arising under another statute. Despite the lack of precedent, the court below sanctioned a Settlement Agreement in a RICO action between the government and the IBT which created a private forum to adjudicate unfair labor practices arising under the NLRA against Yellow Freight. The panel decision is in direct conflict with no fewer than five controlling decisions of this court.

The Decision of this United States Court of Appeals for the Second Circuit is a "profoundly troubling precedent" (A33) which under the guise of the All Writs Act and the "public interest" divested Yellow Freight of its property and statutory rights. A Consent Decree between the government and the IBT cannot waive the property right of a non-party employer to enforce a lawful no-solicitation policy against non-employees as permitted by

this Court in *Lechmere v. NLRB*, ___ U.S. ___, 112 S.Ct. 841 (1992), and, in the event of a dispute over the scope of this right, to have the controversy heard and determined as an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). Yet the Consent Decree recasts unfair labor practice claims as a violation of the Election Rules and requires their resolution by a private Administrator and Election Officer appointed pursuant to the Consent Decree. As this Court has noted, the National Labor Relations Board is vested with exclusive jurisdiction to hear and determine unfair labor practices arising under Section 7 of the National Labor Relations Act. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The extent to which an employer's property rights must yield to the Section 7 rights of non-employees arises directly and exclusively under the NLRA. *Hudgens v. NLRB*, 424 U.S. 507 (1976)

The All Writs Act provides no basis to exercise judicial power in the legislative fashion attempted here. This Court has expressly held that a Consent Decree may not determine the rights of non-parties in their absence, *Martin v. Wilks*, 490 U.S. 755 (1989), or even parties who refuse to assent, *Local 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). Contrary to the decision below, the All Writs Act neither expands the subject matter jurisdiction of a court nor permits it to create substantive rules of law. It merely allows the court to act in aid of jurisdiction already obtained. District courts do not have jurisdiction to hear and determine unfair labor practices nor can they acquire such jurisdiction over non-parties by acquiescing to the insertion of such a self-authorization in a consent decree. District courts lack authority to circumvent established statutory procedures by substituting a procedure of the parties' own device. *Pennsylvania Bureau of Corrections v. United States Marshall Service*, 474 U.S. 34 (1985). Consideration by this Court of this question of exceptional importance is therefore necessary to secure uniformity of its decisions. Moreover, the Court of Appeals

sanctioned a significant departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Accordingly, this Court's immediate review is necessary.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT HOLDING THAT A SETTLEMENT AGREEMENT CANNOT IMPOSE OBLIGATIONS ON ONE WHO WAS NEVER A PARTY TO THE UNDERLYING LITIGATION.

A. IMPOSING THE OBLIGATIONS OF THE ELECTION RULES UPON A NON-PARTY CONFLICTS WITH THIS COURTS DECISION IN *MARTIN v. WILKS.*

This Court's Decision in *Martin v. Wilks,* 490 U.S. 755 (1989), means exactly what it says – a settlement agreement cannot be enforced against someone who is not a party to it. Yet, the Second Circuit's decision glosses over the fact that Yellow Freight's rights were being determined pursuant to a Consent Decree to which it was never a party. The route by which Yellow came to this litigation is as curious as it is unprecedented. The United States attorney and the IBT entered into a Settlement Agreement resolving allegations in a civil RICO action. An outgrowth of the Settlement Agreement was the promulgation of Election Rules, and the creation of a private forum overseen by a court appointed Election Officer and Administrator to hear, determine and remedy violations of the Rules. Nowhere does the opinion and order approving the Election Rules purport to bind anyone other than the parties to the litigation. The order provides:

> It is hereby ordered that all subordinate entities of the International Brotherhood of Teamsters, including all locals, joint conferences,

> and area conferences, are hereby bound by these Election Rules, effective immediately.
>
> It is further ordered that these rules shall be enforceable upon pain of contempt *United States v. IBT (Election Rules Order)*, 742 F.Supp. 98, 108 (S.D. NY 1990).

While reference to any "employer" is notably absent from the Settlement Agreement, the later adopted Election Rules nevertheless purport to empower the appointed officials to order that non-employees be given access to the property of any "employer." (A105, 113) When Yellow attempted to enforce its valid no-solicitation policy by refusing access for non-employee campaigning, protests were filed with the Election Officer. (A84-97) The Election Officer, the Independent Administrator and the district court all determined Yellow Freight's denial of access violated the Election Rules. The court's only basis for this holding was that the non-employee complainants had a preexisting right to engage in such campaigning under the NLRA. In fact, the Second Circuit specifically noted that in evaluating the merits of the claim it was "requiring strict adherence to the requirements of federal labor law in enforcement of the consent decree" to avoid running afoul of the holding in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). (A20) In essence, the panel majority is holding that non-party, non-employees may file an unfair labor practice charge against an employer and have it adjudicated by private citizens, appointed pursuant to a settlement agreement in a case to which the employer is also a non-party – despite three decades of precedent holding that the NLRB has exclusive jurisdiction over such charges. Never before has this Court held that parties to a lawsuit may impose such obligations upon non-parties simply by writing it into their settlement agreement.

As Judge Winter recognized in his dissent, that is a legislative act; an act which both imposes new affirmative legal duties upon the nation at large, and repeals an

existing statute which forbids the court to exercise jurisdiction over this class of dispute:

> [I]t is a mystery to me where the IBT and the government found the authority to empower the Administrator to adjudicate unfair labor practice charges involving non-parties to the Decree. This issue is not directly addressed in my colleagues' opinion. In fact, Congress has designated exclusive procedures for the adjudication of unfair labor practice claims. I know of no theory under which the IBT and the government had the power, essentially legislative in nature, to override Congress's explicit direction that Clement and McGinnis file their unfair labor practice charges with the NLRB.
>
> Not surprisingly, I also do not agree that the IBT and the government had the power to erase Yellow Freight's rights to litigate the unfair labor practice charges before the NLRB. Nor do I agree that allowing the IBT and the government to accomplish this legislative act was not a denial of due process to Yellow Freight . . . Yellow Freight was not accorded due process when the consent decree deprived it of the right to litigate unfair labor practice charges before the NLRB. (A29, Winter, J., dissenting).

The origin of the powers being exercised by the IBT and the government with the tacit approval of the district and circuit courts is indeed mysterious. This usurpation of Congress' legislative power by the Executive Branch and a labor union, with a wink and a nudge from the judiciary, violates the separation of powers doctrine and the express command of Article I, Section 1 of the Constitution. This Court has never wavered from "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Martin v. Wilks*, 490 U.S. at 759.

This principle is traceable back to the words of Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in a legal proceeding, a person not privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 441.

Later, the issue arose with respect to settlement agreements in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), an antitrust case with a remarkably similar factual setting to the present case. In *Fox Publishing*, the government sued an association and its officers, alleging unlawful acts both in the association's dealings with outside parties and in its treatment of members *inter sese* – including the domination of the association in its elections by a small court of members. The case resulted in a consent decree which, in part, provided for changes in election procedures to ensure "more democratic administration" of the association. 366 U.S. at 685-687. When several members of the association sought to intervene and oppose a particular modification of the consent decree, the court denied that effort, holding that:

> Just as the government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation. *Id.* at 689.

Two subsequent decisions, arising in the context of race discrimination claims, have considered, and rejected, any binding effect of consent decrees on non-parties. First, in *Local 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), a labor union challenged the validity of a consent decree on the ground that it was entered without the union's consent. The union was permitted to intervene in the underlying litigation and, as such, claimed

the court could not enter a consent decree involving claims made against the original parties to the action without its explicit approval. Rejecting this argument, the Court held that the union's failure to join in the settlement agreement did not bind "Local 93 to do or not to do anything." *Id.* at 530. The Court noted:

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party without that party's agreement . . . and, of course, the court may not enter a consent decree that imposes obligations on a third party that did not consent to the decree. *Id.* at 529.

The second decision, *Martin v. Wilks, supra,* held that a group of white firefighters, who were not parties to, or otherwise involved in, an employment discrimination suit resulting in a consent decree, could challenge the adverse effect of personnel decisions made pursuant to the consent decree. The basis for allowing the firefighters to challenge the decree was the longstanding principle that settlement agreements cannot adjudicate the rights of absent parties:

> All agree "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 117, 8 L.Ed.22 (1940). This rule is part of our "deep rooted historic tradition that everyone should have his own day in court." A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings. *Id.* at 762 (other citations and footnote omitted)

Noting that a non-party's failure to intervene in the suit is not a bar to a subsequent attempt to challenge actions taken pursuant to the Consent Decree, the Second Circuit then proceeded to misapply the holding in *Martin*:

> *Martin* does not purport to bar any impact of the Consent Decree upon a non-party to the Decree. Rather, it addressed the issue of whether such a nonparty is entitled to its own "day in court" to challenge any such impact. *See, Martin*, 490 U.S. at 762. (A13)

It is one thing to recognize that a Consent Decree may have impact upon non-parties who, at some future time, will have the right to mount an appropriate challenge. It is quite another matter to directly impose the Consent Decree's burdens on a non-party from the outset. Here the burdens of the Consent Decree were imposed on Yellow by the adoption of the Election Rules which expressly provide for access to an employer's premises. This allowed IBT members to accuse Yellow of violating the Election Rules, which in turn forced the Company to defend itself before the district court and its appointed officers under pain of contempt. Clearly, this is not the "day in court" envisioned by *Martin*.

The Second Circuit attempts to distance itself from *Martin* by proclaiming "the district court did not rule that the Consent Decree, of its own force, bound Yellow." (A12) However, Chief Justice Rehnquist rejected that same distinction in *Martin*:

> The dissent argues on the one hand that respondents have not been "bound" by the Decree but rather, they are only suffering practical adverse effects from the Consent Decree . . . Respondents in their suit have alleged that they are being racially discriminated against by their employer in violation of Title VII: Either the fact that the disputed employment decisions are being made pursuant to a consent decree is a defense to respondents Title VII claims or it is

> not. If it is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the Decree. 490 U.S. at 765, n.6

Similarly, either Yellow is bound by the Election Rules, a creature of the Consent Decree, or it is not. The sole holding of the Election Officer is that the Company's no-solicitation policy was "violative of Article VIII, Section 10(d) of the [Election] Rules . . . " (A66) The Administrator affirmed the decision of the election officer (A46) which was later affirmed by the District Court "in all respects." (A44-45) If Yellow can be cited with a direct violation of the Election Rules, forced to defend itself before two court-appointed officers and subsequently the district court under pain of contempt, then it is very difficult to see why Yellow is not being "bound" by the Decree.

The panel decision approves of dragging Yellow before the district court and its officers on the rationale that "few persons are in a better position to understand the meaning of a Consent Decree than the district judge who oversaw and approved it." (A20) The flip side of this coin is that a court's oversight and approval of a settlement is not a permissible basis for imposing its obligations upon non-parties. As noted in *Martin*:

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them the burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they require knowledge of the lawsuit. 490 U.S. at 765.

The panel's unwarranted gloss on *Martin* transposes the required burden of joining the proper parties and

instead would require Yellow to intervene in the RICO case in order to preserve its absolute constitutional right not to be bound or affected by the settlement agreement. That is exactly the argument, and the result, rejected in *Martin*.

B. The All Writs Act May Not Be Invoked To Avoid Compliance With Established Statutory Procedures Merely Because Such Compliance Appears Inconvenient Or Less Appropriate.

Since Yellow never agreed to be bound by the Consent Decree and its Election Rules, the only purported source of the Court's authority to constrain Yellow to comply with the Rules is the All Writs Act, 28 U.S.C. §1651 which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law.

The court below framed the issue as whether "the All Writs Act authorized the district court and the officials acting pursuant to its authority to issue the order requiring Yellow Freight to permit campaigning on its property." (A12) However, the All Writs Act does not give the district court that authority. The power of the courts to impose burdens on non-parties under the All Writs Act is not without limits.[3] The Act only provides courts with the "procedural instruments" to carry out orders previously

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[3] The very terms of the Act impose two restrictions. First, the writ must be in aid of the Court's lawful jurisdiction. The All Writs Act does not expand jurisdiction of the Court. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 25 (1943); *United States v. IBT* (All Writs Appeal), 907 F.2d 277, 281 (2nd Cir. 1990). Second, the writ must be "agreeable to the usages and principles of law." *United States v. Haymon*, 342 U.S. 205, 221, n.5 (1952).

issued in the "exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Company*, 434 U.S. 159, 172 (1977).

The limits of the All Writs Act were delineated in *Pennsylvania Bureau of Corrections v. U.S. Marshals Service*, 474 U.S. 34 (1985). In the course of a civil rights case brought by a state prisoner in federal court, the federal magistrate invoked the All Writs Act and ordered the U.S. Marshal to transport state prisoners between the federal courthouse and a county correctional facility where they were being housed. The Marshal Service successfully challenged the magistrate's order. The Court noted that any authority for the magistrate's order must derive from an independent statutory source other than the All Writs Act. The applicable statute, the habeas corpus statute, 28 U.S.C. §2243 applied only to the prisoner's custodian, but no one else. The Marshal Service, not being the custodian, could therefore not be ordered to transport the prisoners because the All Writs Act did not furnish a basis to contravene express directives of the statute:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. *Id.* at 43.[4]

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[4] Similar limits on the All Writs Act were expressed in *Plum Creek Lumber Co. v. Hutton*, 608 F.2d 1283 (9th Cir. 1979). In a cross-claim to enforce an administrative warrant, the Occupational Safety and Health Administration claimed Plum

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Here, resort to the use of the extraordinary remedies of the All Writs Act was not authorized because clearly defined procedures were available to the District Court. The first is joinder under Rules 19 and 20 of the Federal Rules of Civil Procedure. Thus, the holding in *U.S. Marshals* would seem to proscribe the use of the All Writs Act. As previously noted, *Martin v. Wilks* holds that it is the parties' burden to join those parties at "whose expense relief might be granted." 490 U.S. at 765. Clearly, campaigning by IBT members upon employers' property was contemplated since the Election Rules adopted as part of the Settlement Agreement speak directly to this matter. (A105) Given the parties' pre-existing knowledge of this fact, their option was to either join employers under Rule 19 or leave them out of the picture.

The chosen method – writing rules for employers in their absence and then invoking the All Writs Act to

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Creek was unlawfully interfering with its investigation. OSHA sought permission to have Plum Creek employees wear OSHA-installed monitoring devices as part of their investigation. The company refused claiming the wearing of such devices violated established company rules. OSHA argued the district court had authority under the All Writs Act to order the wearing of such devices in aid of its jurisdiction to enforce the administrative warrant. The Ninth Circuit disagreed, noting that in the absence of any statutory or regulatory authority requiring employers grant OSHA permission to install monitoring devices on their employees, the All Writs Act was inapplicable. It noted that the All Writs Act was not a grant of plenary authority to require a party to bear risks not otherwise demanded by law or to aid the government in conducting a more efficient investigation when other forms are available. By analogy, in the absence of any statutory or regulatory authority under RICO to enjoin the enforcement of Yellow Freight's lawful non-employee, no-solicitation rule, the All Writs Act is inapplicable.

obtain compliance – is not an available option. As pointed out in Judge Winter's dissent:

> . . . Yellow Freight was not accorded due process when the Consent Decree deprived it of the right to litigate unfair labor practice charges before the NLRB rather than before the Administrator. Yellow Freight had neither notice nor a hearing in the RICO proceeding as to the potential loss of its rights under federal law. If the IBT and the government had the power to erase Yellow Freight's rights, then Yellow Freight should have been made a party defendant in the RICO action and allowed to litigate to final judgment the issue of whether the loss of such rights could be granted as relief. (A29-30)

The above passage references the second applicable procedure, the one prescribed in the NLRA. There is no contention that the controversy below involved any rights other than those derived from Section 7 of NLRA. Assuming the court below was correct in holding the NLRB lacks exclusive jurisdiction in this instance (A20), the NLRA nevertheless constitutes a statute which "specifically addresses the particular issue at hand." *U.S. Marshals*, 474 U.S. at 43. Hence, the extraordinary invocation of the All Writs Act may not be used to avoid the ordinary process of the NLRB.

The Second Circuit's opinion attempts to avoid the inevitable conflict with *Martin* and *U.S. Marshals* by proclaiming the district court acquired jurisdiction over Yellow Freight pursuant to RICO (A14), and that enforcing the Election Rules is in the "public interest." (A13) With respect to the court's jurisdiction under RICO, the opinion only refers to *in personam* jurisdiction. However, that was not Yellow's contention. Yellow Freight's claim was that before its rights could be adjudicated in its absence, the court was required to obtain jurisdiction by joining it as a party. Nobody has ever contended that Yellow Freight has done anything to violate RICO – certainly not

its alleged violation of the Election Rules. RICO provides the district courts only with subject matter jurisdiction to "prevent and restrain violations of section 1962 of this chapter." 18 U.S.C. §1964(a). Not only is there no allegation that Yellow violated section 1962 but any issue whether the named Defendants violated section 1962 dropped out of the case as well when it was settled. *Badgeley v. Varelas*, 729 F.2d 894, 899 (2d Cir. 1984); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

Before invoking the "public interest," the panel majority observed there are limited exceptions to the rule that a non-party cannot be bound by a consent decree. Yet, they failed to enumerate what the exceptions are, or whether Yellow Freight fits into any of them. Actually, there is only one exception to this rule: a non-party may be bound by a decree only where its interests were adequately represented by an actual party to the decree. *Martin*, 490 U.S. at 762, n.2, citing *Hansberry v. Lee, supra; see also, United States v. IBT* (Appeal of Affiliated Locals), 931 F.2d 177 (2d Cir. 1991) (Local union affiliates of the IBT bound by Consent Decree because the IBT was an adequate representative of their interests).[5] No one has

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[5] Curiously, in *United States v. IBT* (Appeal of Senese), 941 F.2d 1292, 1295-97, the Second Circuit held that the Independent Administrator's expulsion of a union member was not state action but rather private action because the Administrator was acting under authority granted by the Teamsters' constitution. Subsequently, in *United States v. IBT* (Star Market), 954 F.2d 801 (2d Cir. 1992), the Court held this prior holding applicable and found no state action was involved when the Administrator under the Election Rules reinstated a discharged employee who claimed his discharge was in retaliation for his campaign activities relating to the upcoming Teamster election. If the Second Circuit is correct in its assumption that the appointed officer's enforcement of the Election Rules is not state activity, the use of the All Writs Act in this instance is

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ever contended Yellow's interests were represented, adequately or otherwise, by any party in the RICO litigation.

The panel majority makes a serious mistake when it equates the amorphous concept of "public interest" in a case with the adjudication of "public rights." In the context of the All Writs Act, "public rights" is a term of art meaning that the case adjudicates rights as between competing segments of the public, to have the government obey the law. "Public rights" cases satisfy due process because they come within the above noted exception by finding the enjoined non-party was adequately represented in the litigation by an actual party: the defendant governmental entity, which is deemed the representative of its electorate community. *e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 692 n.32.

The Second Circuit asked the wrong question and got the wrong answer. Their decision to apply the All Writs Act stems from the inquiry as to "whether the district court's order was necessary or appropriate to the implementation of the Consent Decree . . . " (A14) The panel is incorrectly assuming their analysis is governed by the nature and extent of the remedies agreed to in the Consent Decree rather than the remedies lawfully permitted by the statute on which the original litigation was based, RICO.

There is a fundamental distinction between a consent decree, which is part contract and part judgment, and a judgment entered after trial on the merits. A federal court is not prohibited from entering a Consent Decree "merely because the decree provides broader relief than the Court could have awarded after a trial." *Firefighters v. Cleveland,* 478 U.S. at 526. What a court may not do is approve a

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being done at the behest of purely private action rather than in aid of the Court's jurisdiction, and has no application whatsoever.

consent decree encompassing remedies that go beyond those provided in the statute, and then employ the All Writs Act as a means of enforcing those obligations against non-parties. This is precisely what the Second Circuit has done in this instance. "[T]he Decree itself cannot be said to have a purpose; rather the parties have purposes . . . ", *United States v. Armour & Co.*, 402 U.S. 673 at 681. Accordingly, the All Writs Act "protects courts not parties." *In re Convertible Rowing Exerciser Patent Lit.*, 616 F.Supp. 1134, 1139 (D.C.Del.1985) As discussed in *Firefighters*:

> Indeed it is the parties' agreement that serves as the source of the Court's authority to enter judgment at all . . . More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a Consent Decree. Consequently, whatever the limitations Congress placed in §706(g) [of Title VII] on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, these simply do not apply when the obligations are created by a Consent Decree. 478 U.S. at 522-523.

Thus, the court below erred when it invoked the All Writs Act as being "necessary and appropriate" to carry out the parties' agreement which imposed obligations beyond those a federal court could impose for violations of RICO. The All Writs Act does not provide the means for a court to accomplish indirectly what it cannot do directly. In this instance, had the government and the IBT litigated this matter to its conclusion, RICO would not permit the district court to order the enforcement of the Election Rules against non-party employers in the manner approved by the panel majority. The Act does not permit a court to violate the doctrine of separation of powers by the exercise of legislative functions which

divest the NLRB of its exclusive jurisdiction to hear and determine unfair labor practices in favor of a privately established tribunal. The All Writs Act only permits the issuance of writs in aid of the court's jurisdiction otherwise obtained. The District Court had not obtained jurisdiction over Yellow Freight to enforce the RICO settlement because Yellow was not joined as a party. And, the court has never obtained jurisdiction to hear unfair labor practice charges against Yellow Freight because Congress has not so provided.

II. THE ALL WRITS ACT DOES NOT AUTHORIZE DISPLACEMENT OF CONGRESS' LEGISLATIVE SCHEME FOR ADJUDICATION OF UNFAIR LABOR PRACTICES BEFORE THE NATIONAL LABOR RELATIONS BOARD WHICH IS THE ONLY LAWFUL FORUM TO RESOLVE A DISPUTE OVER NON-EMPLOYEE RIGHTS OF ACCESS TO EMPLOYER PREMISES ARISING UNDER §7 OF THE NLRA.

Never before has a judicial decision authorized use of the All Writs Act to displace an entire legislative scheme enacted by Congress. In its unprecedented decision, the Second Circuit erased Yellow Freight's due process right to have unfair labor practice charges levied against it heard and determined by the NLRB. This unauthorized legislative act subsumes over three decades of precedent by this Court interpreting the NLRA and stands it on end. District courts do not have jurisdiction to hear and determine unfair labor practices; nor do they acquire such jurisdiction by acquiescing in its inclusion in a consent decree.

Section 7 of the NLRA, 29 U.S.C. §157, guarantees the rights of employees to "form, join, or assist labor organizations," select agents for the purpose of collective bargaining, and to otherwise act in concert for mutual aid and protection. (A115) Section 8 of the Act reinforces those rights by enumerating unfair labor practices which

unlawfully infringe upon them. 29 U.S.C. §158. (A115-116) Section 10 of the Act empowers the NLRB to enforce Section 7 rights by preventing the unfair labor practices listed in Section 8. 29 U.S.C. §160(a). (A117)

The Election Rules purportedly grant IBT members their "pre-existing" right of access to campaign on an employer's property. (A104) Being that Yellow Freight was not the employer of any of the complainants, the only pre-existing right ever found by the Election Officer, the Administrator and the courts were those guaranteed under Section 7 of the NLRA.[7] Thus, the sole basis for determining that Yellow Freight violated the Election Rules is no more or no less than a finding that Yellow Freight committed an unfair labor practice – a finding which only the NLRB is entitled to make.

The NLRB has exclusive jurisdiction to remedy claims arguably within the scope of Section 7 and Section 8 of the NLRA. In such instances, the "courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state inference with national policy to be averted." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959). This settled rule has been applied specifically with respect to Section 7-based claims for non-employee access to an employer's private property. *Hudgens v. NLRB,* 424 U.S. 507 (1976). *Hudgens* involved an unfair labor practice charge against a shopping center owner whose general manager threatened to arrest union employees engaged in peaceful primary picketing of a retail store located in the center. The union's contention that the picketers had a First Amendment right to picket the shopping center for the purpose

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[7] Section 7 rights encompass distribution of literature at the workplace including union institutional literature. *NLRB v. Magnavox Co. of Tennessee,* 415 U.S. 322 (1974).

of advertising the strike to the public was rejected. Rather, the Court held:

> . . . [T]he rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act. Under the Act, the task of the Board, subject to review by the courts, is to resolve conflict between Section 7 rights and private property rights, and to seek a proper accommodation between the two. *Central Hardware Co. v. NLRB*, 407 U.S. at 543. *Id.* at 521.

Recently, in *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S.Ct. 841 (1992), the Court clarified the relationship between Section 7 rights of employees and the private property rights of their employers. *Lechmere* concerned a claim of access by non-employee union organizers to the private property of an employer they were attempting to organize. The Court noted that Section 7 guarantees rights only to employees, not to non-employees. Therefore, the right of non-employee access is derivative of the employee's right to self-organization. The NLRB is required to strike the appropriate balance between Section 7 and private property rights only in the "limited circumstance" where reasonable access to employees is not feasible. *Id.* at 848.

In spite of the well-established principle that the balance between Section 7 rights of employees and private property rights is to be determined by the NLRB under the NLRA, the Circuit Court failed to defer to the exclusive jurisdiction of the Board. The panel decision cites a series of decisions which purport to be exceptions to the exclusive jurisdiction rule laid down in *Garmon*.[8]

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[8] Cases cited in the Court's opinion are (A18-19): *Sears Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978) (Enforcement permitted of state trespass law by

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However, the rule concerning such exceptions to NLRB jurisdiction for claims arising under federal law is set forth in *Amalgamated Ass'n of St., E.R.&M.C. Emp. v. Lockridge*, 403 U.S. 274 (1971):

> The pre-emption doctrine we applied today, is like any other purposely administrated legal principle, not without exception. The same considerations that underlined *Garmon* have led this Court to permit the exercise of judicial power over conduct arguably protected or prohibited by the [National Labor Relations] Act where Congress has determinatively indicated that such power should exist. *Id.* at 297.

Congress made no general grant of jurisdiction over Sections 7 and 8 of the NLRA when it enacted RICO. Indeed, the congressional intent to exclude Sections 7 and 8 matters from the scope of RICO is revealed in the

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State Court regarding picketing which is arguably – but not definitely – protected by the NLRA); *Breininger v. Sheet Metal Workers Int'l. Ass'n. Local Union No. 6*, 493 U.S. 67 (1989) (District Court jurisdiction exists in suit alleging union's breach of duty of fair representation, even though conduct might also violate §8(b) of the NLRA); *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971) (State court has jurisdiction to hear claim arising under §101(a)(5) of Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(5), where claim is arguably unfair labor practice under §8 of the NLRA); *American Postal Workers Union v. United States Postal Service*, 766 F.2d 715 (2nd Cir. 1985) (District Court and NLRB have concurrent jurisdiction to enforce labor contracts although conduct might also involve unfair labor practice), *cert denied*, 475 U.S. 1046 (1986); and *United States v. Boffa*, 688 F.2d 919 (3rd Cir. 1982) (Prohibition of defendant's conduct by §8 for the NLRA does not preclude RICO criminal prosecution if the latter independently proscribes that conduct), *cert denied*, 460 U.S. 1022 (1983).

statute itself. Enumerating the acts which constitute "racketeering activity" under RICO, Congress included only three crimes related to labor relations: Payment of bribes to unions, 29 U.S.C. §186; embezzlement of union funds, 29 U.S.C. §501(C); and embezzlement of pension funds, 18 U.S.C. §664. RICO contains no other labor law reference and in particular does not refer to the NLRA. 18 U.S.C. §1961(1)(B). Thus, Congress' inclusion of only three labor statutes as RICO predicates clearly indicates that it intended to exclude all others:

> The inclusion of §186 violations as predicate acts [under RICO] suggests that Congress is being selective as to what activities are being removed from the ambit of the exclusive jurisdiction of the labor law. The violation of no other labor statute constitutes a RICO predicate act. *Butchers Union Local 498 v. SDC Investment, Inc.*, 631 F.Supp. 1001, 1009 (E.D. Cal. 1986).[9]

Thus, RICO not only lacks any language which will allow a court to decide Sections 7 and 8 issues, it evidences a specific congressional intent not to extend such authority.

The Court below noted the district court's appointed officials were "directly applying the NLRA rather than some separate body of law" (A19) but nevertheless held the exclusive jurisdiction of the Board should be denied due to considerations with respect to the Consent Decree: those considerations being to avoid inconsistent interpretations and judgments regarding the Decree and the avoidance of repetitive litigation which could occur if the District Court lacked authority to address matters that

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[9] *See also,* note, *Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes,* 76 Ky.L.J. 201, 236 (1988).

could arguably be deemed an unfair labor practice under the NLRA."[10] (A19-20)

There are two flaws with this analysis. First, the fear of inconsistency is misplaced; and second, the matter being determined is not "arguably" an unfair labor practice claim – it is an unfair labor practice claim. The former concern was cogently addressed in Judge Winters' dissenting opinion:

> My colleagues reason that the proceedings against Yellow Freight are necessary to avoid inconsistent interpretations of the Decree. If the Decree merely incorporates pertinent provisions of the NLRA, however, then the only inconsistencies that might arise will be between the Administrator's interpretation of the NLRA and the NLRB's interpretation of the same statute. The apprehension that the Administrator may disagree with the NLRB as to the meaning of the NLRA, and the tacit but yet inexorable assumption that the Administrator's view should prevail, merely highlight the illegitimacy of viewing the Consent Decree as vesting the Administrator with jurisdiction over unfair labor practices. It goes without saying that the All Writs Act goes not authorize the displacement of Congress' legislative schemes for the adjudication of unfair labor practices. (A30)

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[10] "Any person" may file an unfair labor practice charge with the NLRB irrespective of whether they are the aggrieved party. *See* NLRB Casehandling Manual, Part I, Unfair Labor Practice Proceedings, Para. 10016 (1989). Thus, the avoidance of the NLRB's exclusive jurisdiction and the resort to extraordinary writs was unnecessary and an abuse of discretion. The complainants, the Election Officer or the Administrator were all entitled to file charges with the NLRB. Had they done so, all the concerns expressed by the court for not resorting to the NLRB ironically would have been alleviated.

Second, the panel decision proceeds with the assumption that so long as it is applying NLRA precedent to claims before it, divestment of the NLRB's jurisdiction is somehow harmless. The decision stated:

> . . . [B]y requiring strict adherence to the requirement of federal labor law in the enforcement of the Consent Decree, *see infra*, we preclude that "interference with the national policy" that was the focal concern in *Garmon*. *See*, 359 U.S. at 245. (A20)

While there may be numerous forums with the technical competence to apply NLRB precedent to particular claims, they are not the NLRB.[11] The Second Circuit's belief that rigorous application of NLRB precedent is an

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[11] The court further concludes that the procedures made available to Yellow Freight were "generally comparable to those provided by the NLRA." (A17) The mere fact the procedures provided are "comparable" to the NLRB is not a recognized basis to divest the NLRB of its exclusive jurisdiction. More importantly, the procedures provided were not comparable. The NLRB must operate within the confines of the NLRA which encompasses the Administrative Procedures Act, 5 U.S.C. §551 et seq., 29 U.S.C. §156. Pursuant to this directive, the NLRB has issued rules governing their proceedings. 29 C.F.R. §101, et seq. These procedures came into existence by act of Congress. The Election Rules came into existence by private agreement. There is no requirement of neutrality on the part of the Election Officer or Administrator, nor is there any required separation of the investigative, prosecutorial, and adjudicative functions. In fact, the Administrator is paid by the IBT, and "the position is under the control of the IBT and remains a private not a governmental role." *United States v. IBT* (Appeal of Senese), 941 F.2d at 1296. The procedures provided by the Election Rules are not those promulgated under the prescriptions of the APA, but are merely those that are "most appropriate" in the sole opinion of the Administrator. (A108)

adequate substitute for the Board's consideration was expressly considered, and rejected, by this Court in *Lockridge*, 403 U.S. at 289, 290:

> Thus, that a local court, while adjudicating a labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relative potential for debilitating conflict is absent.

The final consideration relating to the exclusive jurisdiction of the NLRB was expressed in *Sears Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978). Although *Sears* dealt with federal pre-emption of a state law claim, the rationale is equally applicable to the present controversy. The Court in *Sears* held that the "critical inquiry . . . is whether the controversy presented to the State Court is identical to . . . or different from . . . that which could have been, but was not presented to the Labor Board." *Id.* at 197. Where the controversy is identical, the risk of interference with the unfair labor practice jurisdiction of the NLRB is present and violates the "arguably prohibited" branch of the *Garmon* doctrine. By permitting the court-appointed officials to hear the claims against Yellow but requiring them to strictly apply NLRB precedent not only was the controversy presented identical to the unfair labor practice claim, the Second Circuit mandated that it be so. The end result is not adherence to the *Garmon* doctrine but the disregard of it in its entirety.

CONCLUSION

Should the decision below be allowed to stand, every suit where the government sues a labor union or trade

association will afford the Justice Department the opportunity to impose sweeping new regulatory schemes without the concurrence of Congress – only the concurrence of a defendant seeking to avoid draconian penalties will be required. The consequences were succinctly summed up in Judge Winter's dissenting opinion:

> I thus regard my colleagues' decision as a profoundly troubling precedent. The reach of the decision is long but the theories on which it is based seem ill-defined and open-ended. It offers no limits to the power of parties to consent decrees to alter radically the substantive legal rights of non-parties by invoking the "public interest" and the All Writs Act. The best that can be said is that their opinion does so in the congenial factual setting of a corrupt and undemocratic union. I hope that all further references to this decision will be accompanied by the words, "That case is easily distinguishable; it involved the Teamsters." (A33-34)

To render this future distinction unnecessary, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1839 – August Term, 1990

(Argued: July 22, 1991 Decided: October 29, 1991)

Docket No. 91-6096

Amended: February 14, 1992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v. -

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA; ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; NUNZIO PROVENZANO, also Known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATORE SANTORO, also known as Tom Mix; CHRISTOPHER FURNARI, SR., also known as Christie Tick; FRANK MANZO; CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang; PHILIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina; ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.,; FRANCIS SHEERAN; MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERONE, also known as Jackie the Lackie, also known as

Jackie Cerone; JOSEPH LOMBARDO, ALSO KNOWN AS Joey the Clown; ANGELO LAPIETRA, also known as The Nutcracker; FRANK BALISTRIERI, also known as Mr. B; CARL ANGELO DELUNA, also known as Toughy; CARL CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer; JOSEPH TREROTOLA, also known as Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eight [sic] Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President; JACK D. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President, THEODORE COZZA, Fifteenth Vice President; DANIEL LIGUROTIS, Sixteenth Vice President; and SALVATORE PROVENZANO, also known as Sammy Pro, Former Vice President,

Defendants,

YELLOW FREIGHT SYSTEMS, INC.

Appellant.

Before:

WINTER, ALTIMARI, and MAHONEY,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, David N.

Edelstein, *Judge*, entered April 3, 1991 that affirmed a determination of the Independent Administrator under a certain consent decree relating to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, granting non-employee union members access to premises of Yellow Freight Systems, Inc. to campaign for union office, and denied the application of Yellow Freight Systems, Inc. for declaratory and injunctive relief from that determination.

Vacated and remanded. Judge Winter dissents in a separate opinion.

JAY G. SWARDENSKI, Chicago, Illinois (Larry G. Hall, Kirk D. Messmer, Patrick W. Kocian, Matkov, Salzman, Madoff & Gunn, Chicago, Illinois, of counsel), *for Appellant.*

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Patrick N. Clement and Robert McGinnis.

Barbara J. Hillman, Gilbert A. Cornfield, Cornfield and Feldman, Chicago, Illinois, *for Election Officer Michael H. Holland.*

MAHONEY, *Circuit Judge:*

Appellant Yellow Freight Systems, Inc. ("Yellow Freight") appeals from an order of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge,* entered April 3, 1991. That order affirmed a determination of officers appointed pursuant to a certain consent decree (the "Consent Decree") relating to the affairs of defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the "IBT") that granted nonemployee members of the IBT access to premises of Yellow Freight to campaign for union office, and denied Yellow Freight's application for declaratory and injunctive relief from that determination. Yellow Freight seeks to enforce a "no solicitation" rule by barring nonemployee union members from campaigning for union office on its property. The district court upheld the appointed officers' determination denying effect to Yellow Freight's rule.

We conclude that the district court was entitled to exercise jurisdiction over Yellow Freight pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction by the authority of the

National Labor Relations Board (the "NLRB") to determine issues concerning unfair labor practices under the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 151-169 (1988). We also conclude, however, that the district court and its appointed officers did not adequately consider the availability of alternate means by which the barred IBT campaigners might communicate with employees of Yellow Freight who are members of the IBT.

We accordingly vacate and remand.

Background

This appeal arises from an ongoing effort of the United States government to rid the IBT of organized crime influence. To that end, the United States commenced this litigation in the United States District Court for the Southern District of New York on June 28, 1988 pursuant to the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C.A. §§ 1961-1968 (1984 & Supp. 1991), and the Consent Decree was entered on March 14, 1989.

The Consent Decree has generated considerable litigation in the Southern District and in this court. As we summarized its provisions in one of those prior cases:

> Under the Consent Decree, three court officers are appointed to oversee certain aspects of the affairs of the IBT: an Election Officer, and Investigations Officer and an [Independent] Administrator. The Election Officer is to supervise the 1991 election of IBT officers. The Investigations

> Officer is granted authority to investigate corruption and prosecute disciplinary charges against any officer, member or employee of the IBT or any of its affiliates. The [Independent] Administrator oversees the implementation of the remedial provisions of the Consent Decree. For example, the [Independent] Administrator sits as an impartial decisionmaker in disciplinary cases brought by the Investigations Officer, conducts the disciplinary hearings and decides them. The [Independent] Administrator may also apply to the district court to facilitate implementation of the Consent Decree, and the other parties to the Decree may make such applications as well. Furthermore, the district court is vested with "exclusive jurisdiction" to decide any issues relating to the actions or authority of the [Independent] Administrator. And the IBT Constitution is amended to incorporate and conform with all of the terms of the Consent Decree.

United States v. IBT, 905 F.2d 610, 613 (2d Cir. 1990).

The fair and open conduct of the 1991 IBT election is a central purpose of the Consent Decree. The election encompasses three phases: (1) the rank-and-file secret ballot election of delegates to the 1991 IBT convention; (2) the election of trustees and nomination of national and regional officers at that convention; and (3) the subsequent rank-and-file secret ballot election of national and regional officers. The dispute at issue in this case arises from campaign activities occurring in the initial (delegate selection) phase of the 1991 election, but has significant implications for the third (election of national and regional officers) phase which is now in process.

Yellow Freight, many of whose employees are IBT members, has the following company policy:

> There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting.

This appeal involves two incidents at Yellow Freight facilities challenging that policy. The first occurred in Chicago Ridge, Illinois. The second occurred in Detroit, Michigan. In October 1990, two IBT members who are not Yellow Freight employees, Patrick N. Clement and Robert McGinnis, entered an unfenced parking lot at the Chicago Ridge facility. They were candidates for delegate from IBT Local 710 to the 1991 IBT convention. Yellow Freight officials asked them to leave and summoned the police, who also asked the men to leave, which they eventually did. They moved to a public sidewalk nearby and continued campaigning. In December 1990, two IBT members who also are not Yellow Freight employees, Michael Hewer and James McTaggart, campaigned for union office at the employee walk-through gate at the Detroit facility. They were required to leave Yellow Freight's premises by Yellow Freight security personnel.

McGinnis, Clement, and Hewer filed protests with the Election Officer, alleging that their exclusion by Yellow Freight violated IBT election rules promulgated pursuant to the Consent Decree (the "Election Rules"). *See United States v. IBT*, 931 F.2d 177, 184-90 (2d Cir. 1991) (approving Election Rules with modification). Following separate investigations in Chicago Ridge and Detroit, the

Election Officer issued two opinions. The first, dealing with the Clement/McGinnis protest, determined that Yellow Freight's policy violated the Election Rules by completely barring Clement and McGinnis from the Chicago Ridge facility, because campaigning on the nearest public sidewalk would provide no meaningful access to the IBT drivers employed by Yellow Freight. The Election Officer therefore required limited access for Clement and McGinnis to Yellow Freight's property either at a parking lot across the street from Yellow Freight's terminal facilities or at an open area outside the terminal building, at Yellow Freight's option. The Election Officer upheld Yellow Freight's exclusion of Hewer from the Detroit facility, however, finding that Hewer could campaign effectively from a public sidewalk and grassy area adjacent to that facility. In making both determinations, the Election Officer restricted his consideration of the availability of alternative means of communication with employees of Yellow Freight to those available at the Chicago Ridge and Detroit terminals.

Yellow Freight appealed the determination regarding Clement and McGinnis to the Independent Administrator, and Hewer appealed the determination adverse to him. The Administrator affirmed both rulings.[1] In doing so, he invoked Article VIII, section 10(d) of the Election Rules, which provides that "no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, . . . or engage in similar activities on employer or Union premises," as well as Article XI, section 2, which includes among the remedies available to the Election Officer in resolving a protest: "requiring or limiting access." The

Administrator reasoned: "In general, the 'pre-existing rights' to engage in campaign activity include any past practice or agreement among employers and the IBT, or its members, which allows for such campaign activity, *and* any substantive rights of union members to engage in such conduct as established by applicable law."

The Administrator found such a right of access for union campaign activity under applicable federal labor law. He further affirmed the rulings of the Election Officer that adequate alternative means of communication were available to Hewer at the Detroit facility, but not to Clement and McGinnis at the Chicago terminal. In affirming the latter ruling, the Administrator considered almost exclusively alternative campaigning feasibilities at the Chicago Ridge terminal, except for the following conclusory statement: "the complainants did not have a reasonable alternative means of communication off company property with IBT members at this facility."

Yellow Freight made additional arguments to the Independent Administrator, and in a subsequent appeal to the district court, which parallel those pressed on this appeal. The district court affirmed the determination of the Administrator, and accordingly denied Yellow Freight's application for declaratory and injunctive relief directed against that determination.

This appeal followed.

Discussion

Yellow Freight tenders four arguments on appeal:

(1) the Consent Decree cannot validly be applied or enforced against Yellow Freight pursuant to either the All Writs Act or any other asserted authority, because Yellow Freight is not a party to the Consent Decree;

(2) the Independent Administrator, the Election Officer, and the district court are denied jurisdiction over Yellow Freight by the NLRA, which vests exclusive jurisdiction over the conduct at issue in the NLRB;

(3) even assuming jurisdiction, the determination herein is not in accordance with law; and

(4) Yellow Freight should be awarded injunctive relief against any further exercise of authority over it by the Independent Administrator or Election Officer.

We address each in turn.

A. The Enforcement of the Consent Decree against Yellow Freight.

The district court premised its assertion of authority over Yellow Freight upon the All Writs Act, which provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a) (1988).

As the Supreme Court has stated:

> The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.

United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) (citations omitted); *see also Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986), cert. denied, 480 U.S. 910, (1987); *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985).

Despite this authority, Yellow Freight contends that the Consent Decree cannot be enforced against it because Yellow Freight is not a party to the Consent Decree. Yellow Freight cites, in support of this view, our recent statement that:

> It is true that, for purposes of interpretation, a consent decree is treated as a contract among the settling parties, *Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S. Ct. 3063, 92 L.Ed.2d 405 (1986), and that the terms of a consent decree cannot be enforced against those who are not parties to the settlement. *Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 104 L.Ed.2d 835 (1989).

IBT, 931 F.2d at 185.

We proceeded immediately to acknowledge, however, that "there are several exceptions to this general rule," *id.*, and invoked one of those exceptions to impose

upon IBT affiliates, not parties to the Consent Decree, the election rules promulgated pursuant to the Consent Decree. *See id.* at 187. We have previously subjected other nonparties to the Consent Decree, *see United States v. IBT*, 907 F.2d 277, 279-80 (2d Cir. 1990); *IBT*, 905 F.2d at 613 (2d Cir. 1990), in the former case invoking the All Writs Act to affirm an order restraining all members and affiliates of the IBT from "filing or taking any legal action that challenges, impedes, seeks review of or relief from, or seeks to prevent or delay any act of [the court-appointed officers] in any court or forum in any jurisdiction except [the Southern District of New York]." 907 F.2d at 279. This case, in any event, does not require us to determine whether the Consent Decree, of its own force, applies to Yellow Freight. Rather, the issue here is whether the All Writs Act authorized the district court and the officials acting pursuant to its authority to issue the order requiring Yellow Freight to permit campaigning on its property.

Nor is it the case that *Martin v. Wilks*, 490 U.S. 755 (1989), upon which Yellow Freight heavily relies, precludes the use of the All Writs Act against Yellow Freight. In *Martin*, white firemen sued the City of Birmingham, Alabama, alleging that they were being denied promotions in favor of less qualified black firemen in violation of applicable federal law. 490 U.S. at 758. The promotions of the black firemen occurred in implementation of two previously entered consent decrees. *Id.* at 758-60. The Supreme Court ruled that, although the white firemen had not attempted to intervene in the litigation that led to the consent decrees, they were entitled to pursue their claims in the subsequent litigation. *Id.* at 761.

In other words, as we have stated, *Martin* "held that a failure to intervene does not bar a subsequent attempt to challenge actions taken pursuant to a consent decree." *IBT*, 931 F.2d at 184 n.2; *see also Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2736-37 (1989) (similarly construing *Martin*). Accordingly, *Martin* does not purport to bar any impact of a consent decree upon a nonparty to the decree. Rather, it is addressed to the issue whether such a nonparty is entitled to its own "day in court" to challenge any such impact. *See Martin*, 490 U.S. at 762.

Yellow Freight also argues that a consent decree, as distinguished from a judgment resulting from litigation pursued to completion, cannot be enforced against a nonparty. Whatever the force of this argument, it is unavailing in this case because the district court has not purported to deem Yellow Freight bound by the Consent Decree. Instead, it has ruled that an order may issue under the All Writs Act to effectuate the Decree.

Yellow Freight further contends that the All Writs Act may be invoked only in certain categories of cases, and that this litigation fits none of those categories. We do not agree with Yellow Freight's characterization of this body of law. In any event, Yellow Freight concedes that "the All Writs Act allows substantive injunctions against technical non-parties . . . [in at least some cases] to enforce a decree which adjudicates public rights." We believe that there is a strong public interest in the ongoing effort in this litigation to open the IBT to democratic processes and purge the union of organized crime influence.

Further, as a general rule:

> [I]f jurisdiction over the subject matter of and the parties to litigation is properly acquired, the All Writs Act authorizes a federal court to protect that jurisdiction even though nonparties may be subject to the terms of the injunction.

IBT, 907 F.2d at 281.

The district court has subject matter jurisdiction of the underlying controversy pursuant to RICO. Yellow Freight does not contest personal jurisdiction, and in any event, "the All Writs Act requires no more than that the persons enjoined have the 'minimum contacts' that are constitutionally required under due process." *IBT*, 907 F.2d at 281 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)).

Since the jurisdictional requirements are satisfied, the remaining issues, in the language of the All Writs Act, are whether the district court's order was "necessary or appropriate" to the implementation of the Consent Decree, and whether it was imposed agreeably "to the usages and principles of law." 28 U.S.C. § 1651 (1988).

The district court articulated the need to provide access to Yellow Freight's Chicago Ridge terminal in the following terms:

> [T]he crux of this Consent Decree is . . . free, open and fair secret ballot elections. In order for those elections to be meaningful, the IBT rank and file must be given a fair choice of candidates. But the reality of such an election is that incumbents may often hold distinct advantages in name recognition, and access to members of a

> local. Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more assertive union representatives. As a result, jurisdiction over employers such as Yellow Freight may be necessary "in aid of this Court's jurisdiction."
>
> As an additional matter, . . . the Independent Administrator reasoned that employers such as Yellow Freight "have the power, if not restrained, to subvert the electoral process . . . " were they to bar IBT members from exercising their right to campaign on employers' premises. . . . Second, the Independent Administrator found that non-employee IBT members have a limited "pre-existing right" of access to non-employer premises as guaranteed by the National Labor Relations Act, ("NLRA") 29 U.S.C. § 158(a)(1), and its subsequent interpretations.

United States v. IBT, No. 88 Civ. 4486 (DNE), slip op. at 6-7 (S.D.N.Y. Apr. 3, 1991).

We agree with this assessment of the need for limited access to employer premises where no feasible alternative for campaigning by candidates for union office is available. We therefore conclude that the order on appeal was "necessary or appropriate in aid of" the district court's jurisdiction over the underlying litigation in which the Consent Decree was entered, and turn to the issue whether it was "agreeable to the usages and principles of law."

We first consider whether the *procedure* made available to Yellow Freight to contest the asserted access was

"agreeable to the usages and principles of law," bearing in mind the mandate of *Martin v. Wilks* that Yellow Freight have its "day in court" on the issue. *See* 490 U.S. at 762. Yellow Freight contends that it was denied "due process," and thereby (*a fortiori*) traditional legal protections, because it was subjected to a consent decree to which it was not a party. But, as we have pointed out, the district court did not rule that the Consent Decree, of its own force, bound Yellow Freight. It acted pursuant to the All Writs Act, and we therefore turn our attention to the particular procedures that have been applied herein in adjudicating Yellow Freight's claimed entitlement to bar Clement and McGinnis from the Chicago Ridge terminal.

Yellow Freight's position has been considered by both the Election Officer and the Independent Administrator, and reviewed, now, by two federal courts. The Election Officer, a former general counsel of the United Mine Workers, inspected both sites at issue, accepted submissions from the parties, wrote letter opinions that addressed the factual and legal contentions of the parties, and decided the controversy regarding the Detroit terminal in favor of Yellow Freight, although ruling against Yellow Freight regarding the Chicago Ridge terminal. The Independent Administrator, a former federal district judge, held a hearing at which testimony was presented, received prehearing legal submissions from the parties, and solicited posthearing submissions. He issued a detailed decision that carefully addressed the legal contentions of the parties, and made *de novo* findings of fact and conclusions of law.

Yellow Freight then availed itself of its right to appeal to the district court.[2] The district court held a

hearing, incorporated the record developed by the IBT trustees at Yellow Freight's request, and issued a memorandum and order that again addressed the issues tendered by the parties. Now, of course, Yellow Freight has taken this appeal, in which the customary appellate procedures of federal circuit courts have been applied. Application may be made, by certiorari, for further review by the Supreme Court.

It is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy. Certainly, furthermore, these procedures are at least generally comparable to those provided by the NLRA for resolution by the NLRB and federal courts of unfair labor practice claims. *See generally* 29 U.S.C. § 160 (1988). We accordingly conclude that Yellow Freight has been accorded adequate procedural protections to satisfy the All Writs Act. *Cf. United States v. IBT*, No. 91-6052, slip op. 6769, 6779-81 (2d Cir. Aug. 6, 1991) (procedures utilized in disciplinary actions pursuant to Consent Decree satisfy due process).

Further, the provision of access to the Chicago Ridge terminal is certainly, as a *substantive* matter, "agreeable to the usages and principles of law" within the meaning of the All Writs Act. There is a thoroughly developed body of federal labor law regarding this issue. Indeed, Yellow Freight contends that the merits of the issue are definitively addressed by the NLRA and consigned thereby to the exclusive jurisdiction of the NLRB. We turn to that contention.

B. NLRB Preemption.

Yellow Freight contends that the conduct at issue in this case is directly regulated by sections 7 and 8(a) (1) of the NLRA, 29 U.S.C. §§ 157 and 158(a) (1) (1988), and accordingly that the NLRB has exclusive jurisdiction with respect to it. In this connection, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), a case involving attempted state regulation of conduct constituting an NLRA unfair labor practice, stated that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Id.* at 245.

This rule, however, is not uniformly applied even as to state regulation. *See, e.g., Sears Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180, 182 & 207-08 (1978) (enforcement of state trespass laws by state court allowed as to "picketing which is arguably – but not definitely – prohibited or protected by federal law"). Furthermore, where federal laws and policies other than the NLRA are implicated, the *Garmon* rule is frequently considered inapplicable. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 110 S. Ct. 424, 429-35 (1989)(district court had jurisdiction to hear fair representation claim although union's breach of duty of fair representation might violate § 8(b) of the NLRA); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237-39, 91 S. Ct. 609, 612-14 (1971)(district court had jurisdiction to hear claim that unlawful expulsion from union violated

§ 101(a)(5) of Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5) (1988), although expulsion was arguably an unfair labor practice violative of §§ 8(b)(1) (A) and 8(b)(2) of NLRA); *American Postal Workers Union v. United States Postal Service*, 766 F.2d 715, 720 (2d Cir. 1985)(district court and NLRB have concurrent jurisdiction over suits to enforce labor contracts, "even if the conduct involved might entail an unfair labor practice"), *cert. denied*, 475 U.S. 1046 (1986); *United States v. Boffa*, 688 F.2d 919, 931 (3d Cir. 1982) (in RICO prosecution alleging mail fraud predicates and substantive mail fraud violations, prohibition of defendants' conduct by § 8 of NLRA would not preclude "enforcement of a federal statute that independently proscribes that conduct"), *cert. denied*, 460 U.S. 1022 (1983). Here, although the appointed officials are directly applying the NLRA rather than some separate body of law, considerations that we have previously recognized with respect to the Consent Decree argue compellingly for a ruling against exclusive NLRB jurisdiction.

We have affirmed an injunction prohibiting all members and affiliates of the IBT from initiating any legal proceeding relating to the Consent Decree "in any court *or forum* in any jurisdiction" (emphasis added) other than the district court from which this appeal was taken, *IBT*, 907 F.2d at 279, "as a necessary means of protecting the district court's jurisdiction over implementation of the Consent Decree." *Id.* at 280. We did so to avoid inconsistent interpretations of, and judgments regarding, the Consent Decree, and also to avoid repetitive litigation that would distract the government and the court-appointed officers from implementation of the Consent Decree.

Id. It would be completely disruptive to rule that despite this arrangement, the district court has no authority to address any matter arising under the Consent Decree that might arguably be deemed an unfair labor practice under the NLRA.[3]

As we have stated, "a district judge can legitimately assert comprehensive control over complex litigation," *IBT*, 907 F.2d at 281, and this rule is properly invoked in this case. *See id.; cf. Berger v. Heckler*, 771 F.2d 1556, 1576 n.32 (2d Cir. 1985)(" '[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it' ")(quoting *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981)). We conclude that the NLRB does not have exclusive jurisdiction over the conduct at issue on this appeal, and that the district court and its appointed officers accordingly did not err in addressing it. Finally, by requiring strict adherence to the requirements of federal labor law in the enforcement of the Consent Decree, *see infra*, will preclude that "interference with national policy" that was the focal concern in *Garmon*. *See* 359 U.S. at 245.

C. The Merits.[4]

Finally, Yellow Freight contends that the substantive determination made by the Election Officer as to the Chicago Ridge terminal, and affirmed by the Independent Administrator and the district court, is incorrect as a matter of law.[5] As indicated *supra*, the claims of Clement and McGinnis for access to Yellow Freight's property are premised upon the provision in Article VIII, section 10(d) of the Election Rules that safeguards "candidates' or

members' pre-existing rights to . . . [campaign] . . . on employer or Union premises." The Independent Administrator properly construed this provision to invoke both "past practice or agreement among employers and the IBT, . . . *and* any substantive rights of union members to engage in such conduct as established by applicable law." The pertinent issue on this appeal is the content of the "applicable law," since no preexisting practice or agreement has been asserted to be pertinent to this controversy. For the reasons that follow, we conclude that the determination on appeal did not adequately consider the availability of alternate means of communicating with Yellow Freight's Chicago Ridge employees at locations other than the worksite, and that the case must accordingly be remanded for reconsideration by the district court and the court-appointed officers.

The landmark case in this area is *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which ruled that:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employee with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

Id. at 112.

Explaining the balance to be struck, the Court went on to say:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are

> granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But *when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,* the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

Id. (emphasis added).

Babcock and Wilcox involved efforts by unions to organize the pertinent employees, rather than intraunion elections. *See id.* at 106. The issue, however, was whether the employers had violated section 8(a) (1) of the NLRA, 29 U.S.C. § 158(a)(1)(1988), by impeding their employees' section 7 "right to self-organization." 29 U.S.C. § 157(1988). It has since been made clear that intraunion campaigning activities implicate employees' section 7 right "to form, join, or assist labor organizations," or to "refrain" therefrom, *id.*, and that unlawful interference with that right is also a section 8(a)(1) unfair labor practice. *See NLRB v. Magnavox Co.*, 415 U.S. 322, 324 (1974); *District Lodge 91, Int'l Ass'n of Machinists v. NLRB*, 814 F.2d 876, 879 (2d Cir. 1987).

Babcock and Wilcox ruled that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts

to communicate with them, the employer must allow the union to approach his employees on his property." 351 U.S. at 113. On the other hand, the NLRA "does not require that the employer permit the use of its facilities for organization when other means are readily available." *Id.* at 114. As the NLRB has summarized:

> *Babcock* thus holds that where persons other than employees of an employer that owns or controls the property in question are concerned, *"alternative means" must always be considered:* a property owner who has closed his property to nonemployee communications, on a non-discriminatory basis,[6] cannot be required to grant access where reasonable alternative means exist, but in the absence of such means the property right must yield to the extent necessary to permit the organizers to communicate with the employees.

Jean Country, 291 N.L.R.B. 11, 12 (1988)(emphasis partially added).

We have most recently considered this issue in *National Maritime Union v. NLRB*, 867 F.2d 767 (2d Cir. 1989), where we affirmed an NLRB determination that an employer had not committed an unfair labor practice by barring union organizers from its boats because "the record [was] inadequate to establish that home visits were unreasonable," and the union "had the burden of proving that alternative means of communication were unreasonable." 867 F.2d at 775.

The problem with the determination on appeal here is that virtually no consideration was given to alternative ways of communicating with the Chicago Ridge

employees of Yellow Freight away from the jobsite. Both the Election Officer and the Independent Administrator recognized in general terms the need to consider alternative means of communication, but specific attention was accorded only to alternatives immediately adjacent to the Chicago Ridge jobsite. The district court affirmed on the basis of the determination by the Independent Administrator. In view of the applicable law, this is clearly inadequate, and we must therefore vacate and remand.

In doing so, we note that the consideration of this issue on remand may take into account all pertinent matters, including time constraints imposed by the impending election schedule and cost factors. *See National Maritime Union*, 867 F.2d at 774. We note also that home visits were considered a plausible alternative in *National Maritime Union* because the union organizers were provided by the employer with the names and addresses of the employees whom the organizers sought to approach. *See id.* at 769. In sum, we do, not seek to pose undue difficulties for the district court and the court-appointed officers in dealing practically and flexibly with the significant burden of overseeing the ongoing IBT election, but we cannot ratify decisions made in that effort which do not comport with the requirements of applicable law.

We note, finally, that if Yellow Freight should on remand be validly compelled to provide access to its Chicago Ridge property in connection with the 1991 IBT election, such compelled access would not inhibit Yellow Freight's continued entitlement to enforce its "no solicitation" policy in the future, in the absence of judicial direction to the contrary. Yellow Freight would not in such circumstances have voluntarily abandoned its policy or

willingly established any exception to it. *Cf. NLRB v. Southern Md. Hosp. Ctr.*, 916 F.2d 932, 937 (4th Cir. 1990) ("[c]laims of disparate enforcement inherently require a finding that *the employer* treated similar conduct differently")(emphasis added); *Restaurant Corp. of Am. v. NLRB*, 827 F.2d 799, 807 (D.C. Cir. 1987) (same); *id.* at 812 n.3 (Bork, J., dissenting in part and concurring in part) (same). Accordingly, such a ruling would establish only that Yellow Freight may on occasion be required to provide access to its property in furtherance of the Consent Decree, despite its "no solicitation" policy. Yellow Freight would continue to be entitled to limit access to its property pursuant to the "no solicitation" policy, subject only to the general limits of federal labor law. *See Babcock & Wilcox*, 351 U.S. at 112.

D. Injunctive Relief.

Yellow Freight asks that we direct the district court to permanently enjoin the Election Officer and Administrator "not to assert authority or jurisdiction over Yellow Freight under color of the [Consent Decree] or Election Rules, not to process any protest or grievance against any act by Yellow Freight, and not to seek to require Yellow Freight to respond . . . to . . . any protest or grievance arising [thereunder]." As is obvious from the foregoing, we will not provide such relief, since we deem Yellow Freight amenable to the authority of the district court and the court-appointed officers as to the dispute on appeal, pursuant to the All Writs Act, and do not consider the authority of the district court and its officers to deal with that dispute to be preempted by the NLRB. Our ruling is

limited to assuring that the correct legal standards are applied in the resolution of this controversy.

Conclusion

The order of the district court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion. Yellow Freight's application for injunctive relief is denied. The parties shall bear their own costs.

FOOTNOTES

1. Hewer has not appealed from this determination, so the balance of the proceedings in this case, including this appeal, are addressed only to the Chicago Ridge controversy.

2. Throughout these proceedings, the appeal procedures made available by the Consent Decree to the parties thereto have been extended to Yellow Freight. Any failure thus to provide an opportunity to Yellow Freight to litigate its claims would run afoul of *Martin*, 490 U.S. at 761-62.

3. As Judge Winter's dissent suggests, the normally glacial pace of NLRB proceedings regarding unfair labor practice is ill suited to the regulation of ongoing IBT elections envisioned by the Consent Decree. Our jurisdictional ruling, however, is not premised upon this consideration.

4. Between the time when this opinion was originally issued on October 29, 1991 and its amendment on February 14, 1992, the Supreme Court decided *Lechmere*,

Inc. v. NLRB, 60 U.S.L.W. 4415 (U.S. Jan. 27, 1992), significantly revising the law hereinafter addressed in section C of this Discussion. Because, on remand, this case has been dismissed as moot in view of the completion of the 1991 election of IBT officers, we deem it unnecessary to amend section C of this Discussion, but append this footnote simply to signal the *Lechmere* development of the law as of the amendment date of this opinion.

5. We are unpersuaded by the argument of counsel for Clement and McGinnis that Yellow Freight has waived its right to contest the merits on appeal. The Election Officer, the Independent Administrator, and the district court all addressed the merits, and Yellow Freight made clear that it contested those rulings. Yellow Freight placed its primary emphasis in the district court upon other arguments, however, in view of the court's expressed desires concerning the issues to be addressed at the hearing that resulted in the ruling on appeal.

6. The Election Officer's letter opinion regarding Chicago Ridge observed that Yellow Freight has permitted some solicitation during the Christmas season by United Way in one of the areas alternatively ordered to be made available to Clement and McGinnis, but the issue of discriminatory access was not otherwise pursued.

U.S. v. IBT, et al., #91-6096

WINTER, *Circuit Judge*, dissenting:

I respectfully dissent.

I do not agree: (i) that the Consent Decree between the IBT and the government purports to vest jurisdiction

in the court-appointed Administrator and reviewing federal courts to adjudicate unfair labor practice charges brought by two IBT members against an employer under the National Labor Relations Act ("NLRA");[1] (ii) that, if the Decree so empowers the Administrator, it is valid; or (iii) that the adjudication in question is authorized by the All Writs Act.

I

With regard to (i), the meaning of the Consent Decree, Article VIII, Section 10(d), provides that "No restrictions be placed upon candidates' or members' pre-existing rights to solicit, support, distribute leaflets or literature . . . or engage in general activities on employer or union premises." Giving this language its ordinary meaning in the present context, there is no basis for finding that Yellow Freight violated its terms. The words "preexisting rights" seem no more than a reference to rights of access previously recognized by employers through contract or past practice or decreed by enforcement orders of the National Labor Relations Board ("NLRB"). This reading accords with the language used in the Consent Decree and limits the rights of access conferred by the Decree to rights enjoyed by the IBT that the IBT may lawfully confer upon IBT members.[2] However, under that reading, Yellow Freight did not violate the Consent Decree. Yellow Freight's no-solicitation rule was in effect when the Consent Decree was signed. Clement and McGinnis thus had no pre-existing right of access to Yellow Freight's premises.

II

However, with regard to (ii), my colleagues read the language differently, based upon the Administrator's interpretation of the words "pre-existing rights" as including "all substantive rights of union members . . . under established law." Under this reading, the Decree purports to vest jurisdiction in the Administrator to adjudicate non-employees' claims of access to Yellow Freight's premises under the NLRA.

Putting aside the All Writs Act for the moment, it is a mystery to me where IBT and the government found the authority to empower the Administrator to adjudicate unfair labor practice charges involving non-parties to the Decree. This issue is not directly addressed in my colleagues' opinion. In fact, Congress has designated exclusive procedures for the adjudication of unfair labor practice claims. I know of no theory under which the IBT and the government had the power, essentially legislative in nature, to override Congress's explicit direction that Clement and McGinnis file their unfair labor practice charges with the NLRB.

Not surprisingly, I also do not agree that the IBT and the government had the power to erase Yellow Freight's right to litigate the unfair labor practice charges before the NLRB. Nor do I agree that allowing the IBT and the government to accomplish this legislative act was not a denial of due process to Yellow Freight. Yellow Freight did have hearings on the unfair labor practice charges before the Administrator and the district court. However, Yellow Freight was not accorded due process when the Consent Decree deprived it of the right to litigate unfair

labor practice charges before the NLRB rather than before the Administrator. Yellow Freight had neither notice nor a hearing in the RICO proceeding as to the potential loss of its rights under federal law. If the IBT and the government had the power to erase Yellow Freight's rights, then Yellow Freight should have been made a party defendant in the RICO action and allowed to litigate to final judgment the issue of whether the loss of such rights could be granted as relief.

III

This brings me to (iii), namely, the All Writs Act issue. I agree with my colleagues that, in contrast to the Consent Decree, the All Writs Act may confer jurisdiction over third parties where necessary to implement otherwise valid provisions of the Decree. My colleagues reason that the proceedings against Yellow Freight are necessary to avoid inconsistent interpretations of that Decree. If the Consent Decree merely incorporates pertinent provisions of the NLRA, however, then the only inconsistencies that might arise would be between the Administrator's interpretations of the NLRA and the NLRB's interpretations of the same statute. The apprehension that the Administrator may disagree with the NLRB as to the meaning of the NLRA, and the tacit but yet inexorable assumption that the Administrator's view should prevail, merely highlight the illegitimacy of viewing the Consent Decree as vesting the Administrator with jurisdiction over unfair labor practices. It goes without saying that the All Writs Act does not authorize the displacement of Congress's legislative scheme for the adjudication of unfair labor practices.

However, my colleagues' discussion of the preemption issue implies that the Consent Decree created independent rights of access, *i.e.*, not based on the NLRA, by IBT candidates to employers' property. Their discussion of the preemption issue relies exclusively on cases in which claims based on other bodies of law, *e.g.*, common law trespass claims or "where federal laws and policies other than the NLRA are implicated," overlap unfair labor practice claims and are validly adjudicated by tribunals other than the NLRB. Those cases are neither analogous nor relevant to the instant matter unless the Consent Decree is viewed as creating a new body of law to be enforced by third parties against other third parties for purposes of the IBT election, another legislative act the IBT and the government had no power to accomplish. Moreover, in their discussion of the All Writs Act, they emphasize the "public interest" in democratizing the IBT and purging it of organized crime influence. Again, this implies that the Decree embodies legal commands beyond those found in present labor law. Whatever the implications of the opinion, however, the content of these new legal commands is not spelled out. Indeed, the Administrator's view of his powers was limited to enforcing "substantive rights . . . under *established* law," (emphasis added), and my colleagues purport to apply only standards derived from the NLRA.

I know of no precedent for this expansive use of the All Writs Act. *United States v. IBT*, 907 F.2d 277 (2d Cir. 1990), held that local unions, who were not parties to the Consent Decree but are constituent bodies of the IBT, had to litigate issues concerning the meaning of that Consent

Decree in the Southern District of New York. This essentially housekeeping decision dealt solely with inconsistencies concerning the meaning of the Consent Decree, not disagreements over the meaning of a federal statute, such as the NLRA. In *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989), the City of Yonkers, pursuant to a consent decree entered in the Southern District, initiated condemnation proceedings in state court. Subsequently, the property owners brought actions in state courts to invalidate the proposed condemnations. We affirmed an order directing the City to remove the state court actions. Our principal concern was again the effect of inconsistent judgments with respect to the meaning of a consent decree. A secondary concern was the fear that the City of Yonkers would not vigorously defend the invalidation proceedings. Finally, in *In re Baldwin-United Corporation*, 770 F.2d 328 (2d Cir. 1985), we upheld an injunction prohibiting states from filing civil actions against parties who were defendants in a multi-district securities litigation. We did so in order to effectuate a settlement agreement in which the plaintiffs had waived their state law claims and to ensure that states could not disrupt the agreement by asserting claims derivative of the settled claims. *See id.* at 336-37.

By contrast, the proceeding against Yellow Freight has nothing to do with either the risk of inconsistent decisions concerning the meaning of the Consent Decree, collusive actions by a party to the Decree, or a need to avoid derivative, duplicative actions that would unravel a class action settlement.

IV

I believe that Clement and McGinnis should have been required to file unfair labor practice charges with the NLRB. With the support of the Administrator, they then could have specifically requested the General Counsel to seek preliminary relief under Section 10(j). 29 U.S.C. § 160(j).

It may be that my colleagues are influenced by the fact that our court records create what might charitably be called a reasonable doubt as to the capacity of the NLRB to act with anything but, again speaking charitably, glacial speed in adjudicating unfair labor practices. *See, e.g., NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *National Maritime Union of America; AFL-CIO v. NLRB*, 867 F.2d 767 (2d Cir. 1989). Nevertheless, there is litigation pending in our court indicating that Section 10(j) actions for injunctions are not unknown. *NLRB v. Domsey Trading Corp., appeal docketed*, No. 91-6203 (2d Cir. Aug. 23, 1991). In any event, the sorry performance of the NLRB is not for us to correct by interpretation of consent decrees between unions and the government.

I thus regard my colleagues' decision as a profoundly troubling precedent. The reach of the decision is long but the theories on which it is based seem ill-defined and open-ended. It offers no limits to the power of parties to consent decrees to alter radically the substantive legal rights of non-parties by invoking the "public interest" and the All Writs Act. The best that can be said is that their opinion does so in the congenial factual setting of a corrupt and undemocratic union. I hope that all further references to this decision will be accompanied by the

words, "That case is easily distinguishable; it involved the Teamsters."

FOOTNOTES

1. Amendments to the majority opinion subsequent to receipt of the galleys from West Publishing Co. have stricken references to the consent decree as a source of authority for the majority's decision. In part, therefore, my dissent now appears to be responding to arguments not raised by my colleagues. I am not altering the substance of the dissent for two reasons. First, such an alteration cannot be accomplished before the publishing of this decision in the hardbound volume of the Federal Reporter, Second Series. Second, because I reject the view that the All Writs Act authorizes the actions of the district court, it is not inappropriate for me to address the question of whether the consent decree may justify those actions.

I will make one further observation. The basis for the view that the NLRA, as administered by the court officers and district court, governs the issues in the instant matter, is based upon the language of Article Eight, Section 10(d), of the consent decree. If the actions of the district court are actually justified by the All Writs Act, then there is no reason to hold that the NLRA governs the employees' rights to hand out leaflets. The right to engage in such distribution should be determined on the basis of what is necessary to bring about the fair election contemplated by the Decree, whether or not such a right exists under the NLRA.

2. I do not mean to suggest that a bright line defines the "preexisting rights" incorporated by the Consent Decree. Indeed, I can imagine a host of definitional problems arising from the provision. Such problems, however, are not a reason to give the Decree an expansive reading.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *et al.*, Defendants.	MEMORANDUM & ORDER 88 CIV. 4486 (DNE)
IN RE: PETITION FOR REVIEW OF DECISION 91-ELEC. APP.-43 OF THE INDEPENDENT ADMINISTRATOR	

APPEARANCES: OTTO G. OBERMAIER, United States Attorney for the Southern District of New York, (Edward T. Ferguson, III, Assistant United States Attorney, of counsel) for the Government;

FREDERICK B. LACEY, Independent Administrator of the International Brotherhood of Teamsters, (Stuart Alderoty, of counsel);

MICHAEL HOLLAND, Election Officer of the International Brotherhood of Teamsters, (Barbara Hillman, of counsel);

MATKOV, SALZMAN, MADOFF & GUNN, Chicago Illinois, (Larry G. Hall, Kirk D. Mesmer, of counsel) for Yellow Freight.

EDELSTEIN, District Judge:

This decision arises from the implementation of the rules for the IBT International Union Delegate and Officer Election promulgated by the Election Officer (the "election rules") and approved by this Court by Opinion & Order dated July 10, 1991, 742 F. Supp. 94 (S.D.N.Y. 1990). These election rules provide a "framework for the first fully democratic, secret ballot election in the history" of the IBT. *Id.* at 97.

Petitioner Yellow Freight Systems, Inc., ("Yellow Freight"), a trucking company that employs IBT members, appeals decision 91-Elec. App.-43 of the Independent Administrator, which consolidated and affirmed the Election Officer's decisions P-021-LU710-CHI, P-023-LU710-CHI, and P-165-LU299-MGN. Yellow Freight petitions this Court to issue injunctive and declaratory relief that would overturn the findings of the Independent Administrator and declare: (i) that the Court Officers had jurisdiction to enforce the election rules with respect to Yellow Freight; (ii) that the decisions of the Court Officers must be pre-empted by the National Labor Relations Board; and (iii) that the decision of the Independent Administrator was not supported by substantial evidence and should be overturned.

As previously ruled at the hearing held March 4, 1991, Yellow Freight's petition is denied in all respects.

(Transcript, March 4, 1991 hearing, at 33-34). This memorandum supplements supplements [sic] those earlier rulings made on this matter.

I. Background and Procedural History

This dispute arose over the efforts of certain candidates running for office in IBT locals that sought access to Yellow Freight terminals in Chicago Ridge, Illinois, and 7701 West Jefferson Avenue, Detroit, Michigan. The incidents involved IBT candidates alleging that Yellow Freight had violated Article VIII, § 10 of the election rules, by not permitting IBT candidates access to Yellow Freight's property for the limited purpose of campaigning among the employees at each sight. Those candidates filed election protests to the Election Officer.

With respect to the Chicago Ridge terminal matter, election protests P-021-LU710-CHI, and P-023-LU710-CHI, the Election Officer determined that the complainants did not have any reasonable alternative means of communicating with the members at that facility off of company property. With respect to the Detroit, Michigan, protests, P-165-LU299-MGN, the Election Officer ruled that the complainant had an alternative reasonable means of communicating with the members off company property, and found that Yellow Freight did not violate the election rules or the Consent Decree.

Yellow Freight appealed both decisions to the Independent Administrator. In his decision 91-Elec. App.-43, the Independent Administrator (i) rejected Yellow Freight's argument that it was not bound by the determinations of the Election Officer or the Independent

Administrator; (ii) rejected Yellow Freight's arguments that any determinations on the instant issues fall under the exclusive jurisdiction of the National Labor Relations Board; and (iii) concluded that the decisions of the Election Officer had sufficient basis in fact, and affirmed those decisions. This appeal followed.

II. Discussion

In appealing the decision of the Independent Administrator, Yellow Freight bears the burden of demonstrating that those findings were "arbitrary or capricious." Paragraph K.16 of the Consent Decree provides that this Court shall review actions of the Independent Administrator using the "same standard of review applicable to review of final federal agency action under the Administrative Procedures Act." Consent Decree at 25. This Court may only overturn the findings of the Independent Administrator when it finds that they are, on the basis of all the evidence, "arbitrary or capricious." This Court and the Court of Appeals have interpreted ¶K.16 to mean that decisions of the Independent Administrator "are entitled to great deference." 905 F.2d at 616 (2d Cir. 1990) *aff'g* March 13, 1990 Opinion and Order, 743 F. Supp. 155 (S.D.N.Y 1990).

Yellow Freight essentially repeats before this Court the same three arguments that were unsuccessful before the Independent Administrator. First, they argue that they cannot be "bound" by the election rules. Second, they argue that the hearings before the Election Officer and Independent Administrator is pre-empted by the National Labor Relations Act. Third, Yellow Freight

argues that the substantive decision of the Independent Administrator regarding the Chicago Heights facility was arbitrary and capricious. All of these arguments are without merit.

Yellow Freight first argues that they cannot be affected by the election mechanism set up under the Consent Decree by the Supreme Court decision in *Martin v. Wilks*, ___ U.S. ___, 109 S.Ct. 2180, 2184 (1989), since by that decision non-parties to a Consent Decree cannot be bound by its terms.

Yellow Freight's particular contention before this Court is that as an employer not in any way affiliated with the IBT, it cannot be bound by the Consent Decree. Yellow Freight's argument concerning the *Martin* case fundamentally mischaracterizes that decision, which is not applicable to this case. *Martin v. Wilks* concerns allowing those affected by a consent decree designed to remedy discriminatory hiring practices but who were not parties to the original suit to challenge actions made pursuant to that decree. The Second Circuit has specifically declined to apply *Martin v. Wilks* in the context of this ongoing case. *United States v. International Brotherhood of Teamsters*, 905 F.2d 610, 622 (2d Cir. 1990). In this circuit and others, courts have "decline[d] to extend *Wilks* beyond its facts." *United States, et al., v. Yonkers Board of Education, et al.*, 902 F.2d 213, 218 (2d Cir. 1990); *see West Texas Transmission L.P. v. Enron Corp.*, 907 F.2d 1554, 1568 (5th Cir. 1990); *E.E.O.C. v. Pan American World Airways*, 897 F.2d 1499, 1506 (9th Cir. 1990).

Even assuming that *Martin v. Wilks* is applicable, Yellow Freight's argument also mistakes the fundamental

posture that they now occupy. By being "bound" by the Consent Decree, Yellow Freight must seek redress for their claims before the Court Officers that the actions of the IBT candidates violated their rights to keep a secure freightyard. Yellow Freight was given a full and complete opportunity to argue their claims before the Election Officer, the Independent Administrator, and this Court, in addition to any right of appeal they may have. By the application of this Consent Decree, Yellow Freight has not been denied any opportunity to litigate their claims. On the contrary, their claims are now being heard for the third time.

This Court has previously found jurisdiction over non-parties to the Consent Decree by the injunction entered under the All Writs Act, 28 U.S.C. § 1651, 728 F. Supp. 1032 (S.D.N.Y. 1990), *aff'd* 907 F.2d 277 (2d Cir. 1990). In issuing that injunction, this Court ruled that all subordinate entities of the IBT must litigate their Consent Decree related claims in this Court as necessary "in aid of [this Court's] jurisdiction." *Id.* It is similarly necessary to apply that decision in this context, since employers such as Yellow Freight could frustrate the electoral provisions of the Consent Decree.

Why this is so is because the crux of this Consent Decree is for free, open and fair secret ballot elections. In order for those elections to be meaningful, the IBT rank and file must be given a fair choice of candidates. But the reality of such an election is that incumbents may often hold distinct advantages in name recognition, and access to members of a local. Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more

assertive union representatives. As a result, jurisdiction over employers such as Yellow Freight may be necessary "in aid of this Court's jurisdiction."

As an additional matter, the grounds relied on by the Independent Administrator were sufficient to find that Yellow Freight was subject to the jurisdiction of the Court Officers. First, the Independent Administrator reasoned that employers such as Yellow Freight "have the power, if not restrained, to subvert the electoral process . . . " were they to bar IBT members from exercising their right to campaign on employers' premises. Decision of the Independent Administrator at 4-7. Second, the Independent Administrator found that non-employee IBT members have a limited "pre-existing right" of access to non-employer premises as guaranteed by the National Labor Relations Act, ("NLRA") 29 U.S.C. § 158(a)(1), and its subsequent interpretations. *See, e.g., Lechmere v. National Labor Relations Board,* 914 F.2d 313 (1st Cir. 1990). The Independent Administrator properly applied the balancing test weighing the availability of alternative means of reaching the membership with the employer's property rights. *Id.* at 320.

Accordingly, Yellow Freight's arguments that they are not subject to the jurisdiction of the Court Officers is without merit and must be rejected.

Second, Yellow Freight contends that the Court Officers are pre-empted from adjudicating these claims because the subject matter in question – whether IBT candidates should be given a limited right of access to Yellow Freight's property for the purpose of campaigning – is solely under the jurisdiction of the National Labor

Relations Board, ("NLRB"). Yellow Freight is in essence arguing that the Court Officers adjudicated a charge that Yellow Freight has violated the candidates Section 7 rights, 29 U.S.C. § 157, guaranteed under Section 8, 29 U.S.C. § 158(a)(1) of the NLRA, the exclusive jurisdiction over which is granted to the NLRB.

At the outset, Yellow Freight's preemption argument is without merit given this Court's All Writs Act decision of January 17, 1990, *supra*, where this Court issued an injunction requiring that all Consent Decree related litigation must take place before this Court. Any NLRB proceeding would be enjoined under that order.

Next, as the Independent Administrator correctly noted, the Supreme Court has held that certain federal claims that might otherwise be unfair labor practices under the NLRA, may nonetheless be litigated in federal court under the Labor-Management Reporting and Disclosure Act ("LMRDA"). *See, e.g., Breininger v. Sheet Metal Workers International Association Local Union 6*, ___ U.S. ___, 110 S.Ct. 424, 429-31 (1989); *Smith v. Evening News Association*, 371 U.S. 195 (1962). The Consent Decree was entered pursuant to the Civil RICO statute, 18 U.S.C. § 1964, and is the underlying legal basis for the election rules. RICO provides a sufficient basis to litigate Yellow Freight's claims before this Court, and not the NLRB.

Third, Yellow Freight challenges whether the facts supporting the Independent Administrator's decisions affirming the Election Officer are sufficient to support his findings. The record indicates that the Independent Administrator's decisions were neither arbitrary nor capricious.

In reaching his decision, the Independent Administrator applied the balancing test to determine the IBT candidates' preexisting rights to campaign on employers' property. *Lechmere v. National Labor Relations Board, supra.* The Independent Administrator reviewed the strength of the IBT members' right to engage in campaign activity, the strength of Yellow Freight's property right, and the availability of a reasonable alternative means of communicating with the IBT members employed at each site.

With respect to the Chicago Ridge, facility, the Independent Administrator found that (i) both IBT members were candidates for delegate, (ii) they were campaigning in a Yellow Freight-owned, unfenced parking lot, (iii) they had no alternative means to effectively communicate with the IBT members employed at that facility, and concluded (iv) that they must be given a limited right of access to Yellow Freight's property. With respect to the Detroit facility, the Independent Administrator found that the IBT candidate had a reasonable alternative means of communicating with IBT members employed at that site, and allowed no right of access to Yellow Freight's facility.

The Independent Administrator properly applied this balancing test in both instances, and his conclusions were neither arbitrary nor capricious. Accordingly, the substantive determinations of the Independent Administrator should be affirmed in all respects.

III. Conclusion

For the reasons stated above, the determinations of the Independent Administrator are affirmed in all

respects. Yellow Freight's application for injunctive and declaratory relief is denied without separate analysis, since this memorandum has already considered and rejected the merits of that application.

So Ordered.

Dated: April 3, 1991
New York, New York

/s/ David N. Edelstein
U.S.D.J.

IN RE: ROBERT McGINNIS and PATRICK CLEMENT, Complainants, and IBT LOCAL UNION 710, YELLOW FREIGHT SYSTEMS, INC., Respondents.	91 – Elec. App. – 43
MIKE HEWER, . Complainant, and IBT LOCAL UNION 299, YELLOW FREIGHTS SYSTEMS, INC., Respondents.	DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter is before me on two separate appeals. The first appeal is from a decision of the Election Officer in Case Nos. P-021-LU710-CHI and P-023-LU710-CHI. The second appeal is from another decision of the Election Officer in Case No. P-165-LU299-MGN. These appeals were consolidated for purposes of the hearing conducted before me. Given the important issues raised

in this appeal, I requested post-hearing submissions. Appearing in person or by teleconference were the following persons: Michael H. Holland, John Sullivan and Barbara Hillman, on behalf of the Election Officer; Julie Hamos and James DeHaan, Regional Coordinators; Larry Hall and Patrick Kocian, attorney's [sic] for Yellow Freight Systems, Inc.; complainants Robert McGinnis and Patrick Clement, and Paul Levy, their attorney; Michael Hewer and Susan Jennik, his attorney; Complainant Edward Vecchio, Secretary Treasurer of IBT Local Union 299; Frank Genty and Robert Jones, employees of Yellow Freight.

These appeals involve the employer Yellow Freight Systems, Inc. ("Yellow Freight"). The protest filed by Robert McGinnis and Patrick Clement concerns an incident which occurred at the Yellow Freight terminal located in Chicago Ridge, Illinois. The protest filed by Mike Hewer concerns an incident which occurred at the Yellow Freight facility located at 7701 West Jefferson, Detroit, Michigan.

Each protest centers around an alleged Yellow Freight violation of the rights of non-employee IBT members to engage in campaign activities on Yellow Freight's property. Specifically, the complainants have alleged that Yellow Freight, acting alone or at the request of the respective Local Union, violated Article VIII, § 10 of the Rules for the IBT International Union Delegate and Officer Election, revised August 1, 1990 ("Election Rules"), by refusing to allow them limited access to Yellow Freight's property for the sole purpose of campaigning among their fellow union members.

Yellow Freight's policy prohibits any non-employee from engaging in any campaign activities on company property. Its written rule, applicable to all of its facilities, including Chicago Ridge and Detroit, provides:

> There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting.

The Election Officer determined that Yellow Freight's "no solicitation" policy, as enforced at its Chicago Ridge terminal, violated the Election Rules and the March 14, 1989, Consent Order by denying complainants McGinnis and Clement limited access to Yellow Freight's property for campaign purposes. The Election Officer found that the complainants did not have a reasonable alternative means off of the company property for communicating with IBT members employed at this facility. In contrast, the Election Officer held that at the Detroit facility Yellow Freight had not violated the Election Rules or the Consent Order when it prohibited the complainant, Hewer, from engaging in campaign activity on its property because he had a reasonable alternative means of communicating with his fellow IBT members off the company's property.

Yellow Freight has appealed the Election Officer's decision in both cases. Yellow Freight argues that the Election Officer and the Independent Administrator lack jurisdiction over it because, as an employer, it was not a party to the underlying civil RICO litigation or the Consent Order. In addition, Yellow Freight raises a preemption argument, contending that the National Labor

Relations Board ("NLRB") has exclusive jurisdiction over the claims alleged in these protests. It also challenges the merits of the Election Officer's determination as to the Chicago Ridge complainants.

I will address Yellow Freight's jurisdictional challenges first, before turning to a discussion of the Election Officer's application of the Election Rules to Yellow Freight.

I. Jurisdiction

Yellow Freight's jurisdictional challenges, if successful, would strike at the heart of the effective enforcement of the Election Rules. If the Court-appointed officers do not have the power to prevent employers from frustrating an IBT member's exercise of the right to campaign for delegate or officer candidates, the Election Rules will have little meaning.

In approving and implementing the Consent Order and the Election Rules, United States District Court Judge David N. Edelstein established a comprehensive remedy designed to rid the IBT of the "hideous influence of organized crime." *United States v. International Brotherhood of Teamsters*, 728 F.Supp 1032, 1036 (S.D.N.Y. 1990). The key to the success of this endeavor lies with the "proposed framework for the first fully democratic, secret ballot elections in the history of [the] union." *United States v. International Brotherhood of Teamsters*, 88 Civ. 4486 (DNE), *slip op.* at 2 (S.D.N.Y. July 10, 1990). Judge Edelstein has characterized an "honest, fair, and free" election process as the "linchpin" of the efforts to cleanse the union of corrupt influences. *Id.* at 3. According to the

Court, "[n]o question is more central to the ultimate success of this Consent Decree." *Id.* at 2.

These lofty goals could not be achieved if third parties were free to effectively disenfranchise the IBT membership. Thus, the Election Officer properly determined, in the exercise of the very expertise concerning intra-union affairs that led to his court appointment, that the right to bring campaign messages to employees at their workplaces is fundamental to the ability of any candidates to successfully campaign for union office, particularly candidates who seek to unseat long-term incumbents who enjoy the advantages that go with incumbency. Indeed, this right is especially important where, as here, we are dealing with a union where, at certain levels, as Judge Edelstein has stated, there exists the "hideous influence of organized crime." It also must be recognized that some employers may have developed comfortable relationships with Local incumbent union leadership that they might wish to preserve in office; and, to the extent this condition exists, there may be an inclination to hinder or impair the candidacy of those who offer the prospect of being more aggressive or combative in representing the employees.

Yellow Freight, and other similarly situated employers, have the power, if not restrained, to subvert the electoral process and thereby eviscerate the most critical provisions of the Consent Order by preventing IBT members from exercising their right to campaign for delegate or officer candidates. The Consent Order provides for the first secret ballot, one-person-one vote [sic] rank and file election ever conducted in the IBT. However, unless IBT members obtain true access to their

fellow members for purposes of campaigning, the election process contemplated in the Consent Order will not be achieved. Since incumbent union officers have far greater name recognition than members of the rank and file, and often will have virtually unlimited access to IBT members at the members' job sites because of their status as union representatives, candidates who are not in office must often have access to work sites for campaign purposes if the playing field of the election process is not to be tilted toward the incumbent.

The Election Rules promulgated by the Election Officer and approved by order of Judge Edelstein recognize the necessity of equal access to work sites for campaigning IBT members and provide for jurisdiction over employers in order to enforce this rule. Article VIII, § 10(d) of the Election Rules states that "no restrictions shall be placed upon candidates' or members' preexisting rights to solicit support, distribute leaflets or literature . . . or engage in similar activities on employer or Union premises." In addition, in Article XI, § 2, the Election Rules provide that the Election Officer may take "whatever remedial action is appropriate" including "requiring or limiting access" to such premises. Enforcement of these rules requires jurisdiction over employers such as Yellow Freight.

The Election Rules, as so ordered by Judge Edelstein, refer to a member's "pre-existing rights to solicit support . . . on employer . . . premises." It is thus appropriate to examine the meaning of "pre-existing rights." In general, the "pre-existing rights" to engage in campaign activity include any past practice or agreement among employers

and the IBT, or its members, which allows for such campaign activity *and* any substantive rights of union members to engage in such conduct as established by applicable law.

The specific issue in the present protests is whether the complainants, non-employee IBT members, have any "pre-existing right" to engage in campaign activity on Yellow Freight's property. In his investigation, the Election Officer did not find any past practice or agreement authorizing access by non-employee IBT members to the Yellow Freight facilities in either Chicago Ridge or Detroit. In fact, Yellow Freight has a strict "no solicitation" policy prohibiting all non-employees from engaging in campaign activities on any company property.

Non-employee IBT members, however, do have a limited right to engage in campaign activity on an employer's premises as guaranteed by the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(1), and decisions by the National Labor Relations Board ("NLRB") and federal courts interpreting this Act. Union members have the right, protected by the NLRA, to engage in communications, solicitations and the like with respect to intra-union affairs, including intra-union elections. *District Lodge 91 International Association of Machinists v. NLRB,* 814 F.2d 876 (2d Cir. 1987); *NLRB v. Methodist Hospital of Gary, Inc.,* 733 F.2d 43 (7th Cir. 1984); *ABF Freight System, Inc. v. NLRB,* 673 F.2d 228 (8th Cir. 1982). Moreover, as the United States Supreme Court recognized in *NLRB v. Magnavox Co.,* 415 U.S. 322 (1974), the right of employees to engage in activity critical of an incumbent union may be as important as the right of non-employee union members to organize the employees of a non-union

employer. When the exercise of such rights conflicts with the property interests of employers, the NLRB has held and the federal courts have affirmed that the right of access by non-employees to an employer's premises depends upon the balancing of the strength of the union member's right to engage in the conduct in question, the strength of the employer's property right and the availability of a reasonable alternative means of communication. *Jean Country,* 291 NLRB No. 4 (1988); *Lechmere v. NLRB,* 914 F.2d 313 (1st Cir. 1990); *Laborers Local Union 204 v. NLRB,* 904 F.2d 715 (D.C. Cir. 1990).

Therefore, I find that non-employee IBT members do have a right, in accordance with "pre-existing law," to engage in campaign activities on an employer's premises subject to the foregoing balancing test. I will discuss this balancing test in greater detail later, when applying it to the present protests.

Judge Edelstein, pursuant to his authority under the Consent Order and the broad powers Congress gave the district courts to fashion remedial measures under the civil RICO statute, 18 U.S.C. § 1964(a), has approved the Election Rules (as amended), which include the pre-existing right of a non-employee union member to engage in campaign activities on an employer's premises subject to the foregoing balancing test. I find that in order to effectuate the Election Rules "so ordered" by Judge Edelstein and to fulfill the purpose and goals of the Consent Order, the Election Officer and the Independent Administrator have the authority to enforce, in accordance with "pre-existing" law, a member's right to engage in campaign activity on employer premises.

Parenthetically, I note that this is not the first time that the United States District Court and its Court-appointed officers have found it necessary to assert jurisdiction over non-parties to the Consent Order. In his "All Writs Decision," Judge Edelstein recognized that interference by third parties could completely undermine the Consent Order and employed the All Writs Act, 28 U.S.C. § 1651, to assert jurisdiction over unrelated persons and entities. *United States v. International Brotherhood of Teamsters*, 728 F.Supp 1032 (S.D.N.Y. 1990), *aff'd* 907 F.2d 277 (2d Cir. 1990). Moreover, other federal courts in various factual situations have also found it necessary to assert jurisdiction over non-parties in order to effectively implement a consent order. *See e.g., United States v. Hall*, 472 F.2d 261 (5th Cir. 1973) (a school desegregation case in which non-parties to the litigation threatened to disrupt the court's remedial order); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert denied*, 109 S.Ct. 1527 (1989) (a discrimination in housing suit in which non-party landowners threatened to destroy a consent decree by filing suit in state court).

The implementation of the Consent Order, and its mandate for fair, honest and open elections, is vulnerable to frustration or disruption by employers like Yellow Freight. If the Consent Order is to have meaning, the Court-appointed officers must have the power to exercise jurisdiction over Yellow Freight and I conclude that we do.[1]

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[1] During the hearing, I asked Yellow Freight's representative if it would entertain my suggestion that, on a voluntary

(Continued on following page)

II. Preemption

Yellow Freight also argues that the claims which are presented here as violations of the provisions of the Election rules are actually unfair labor practices covered by the NLRA, and, therefore, they fall under the exclusive jurisdiction of the NLRB. The issue presented here is whether the United States District Court, the Election Officer and the Independent Administrator have the authority to rule upon and enforce the Election Rules which have been approved by Judge Edelstein pursuant to the Consent Order and pursuant to the broad remedial powers the district courts have in civil RICO actions, *see* 18 U.S.C. § 1964(a), even though the prohibited activity may also be an unfair labor practice under the NLRA. The simple answer to this inquiry is "yes."

The United States Supreme Court has held that the NLRA preempts state law claims that regulate conduct that is arguably protected or prohibited by the unfair labor practice provisions of the NLRA. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Under this decision, such claims must be presented to the NLRB rather than to a court of law. However, preemption does not automatically apply when the NLRA runs counter to the provisions or remedies of another federal statute rather than a contrary state law. The United States Supreme Court has held on several occasions that federal claims may be litigated in federal court, notwithstanding

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(Continued from previous page)

basis, it would open its premises to the above-described campaign activity (as other employers have been doing). My suggestion was rejected.

the fact that the prohibited or permitted activity may also be an unfair labor practice under the NLRA. *See e.g., Smith v. Evening News Association,* 371 U.S. 195 (1962); *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971); *Breininger v. Sheet Metal Workers Local 6,* 110 S.Ct. 424 (1989).

I find that the Congressional determination to provide for federal jurisdiction was no more specific in those cases in which a federal statute was held to override NLRB preemption, than it is here, where Congress has given the federal courts jurisdiction to enforce civil RICO claims. *See* 18 U.S.C. § 1964(a).

The comprehensive remedy embodied in the Consent Order and the Election Rules was approved by Judge Edelstein pursuant to the United States District Court's broad remedial powers in RICO actions. 18 U.S.C. § 1964(a). Even if the conduct complained of here amounted to an unfair labor practice under the NLRA, it is first and foremost a violation of the Election Rules, and is, therefore, subject to the Consent Order's enforcement provisions. By enforcing the Election Rules in this case, the Election Officer and the Independent Administrator, as Court-appointed officers, are merely carrying out the United States District Court's power to enforce its own Consent Order.

Because the protection of a union member's right to engage in campaign activity at the work place is crucial to both the effective implementation of the Election Rules and to the enforcement of the Consent Order, I find that Congress' grant of federal jurisdiction for the enforcement of this civil RICO Consent Order overrides any

concurrent NLRB jurisdiction. Therefore, I find that the Election Officer and the Independent Administrator have the authority to decide and enforce the Election Rules in this case.

III. Findings of Fact and Conclusions of Law

Having considered the jurisdictional issues raised by Yellow Freight, I now turn to the underlying merits of these protests. As discussed earlier, the factual issue presented here concerning the scope of a Union member's right to engage in campaign activities on an employer's premises is not a novel one, but rather is a conflict that the courts have grappled with for decades in varying factual situations. On the one hand, the courts have upheld the legal right of union members to engage in communications and solicitations with respect to intra-union affairs, including intra-union elections. In fact, within the context of the election provisions of the Consent Order, as incorporated in the Election Rules, and as I have already noted, *see* p. 8, *supra*, the right of IBT members to engage in campaign activities that may be critical of the incumbent union officers is as important, if not more important, than the right to organize an employer's employees. On the other hand, the courts have recognized that the exercise of such rights may impact upon the property interests of employers. In resolving this conflict, it is necessary to strike an equitable balance between the competing rights of the union members and the employer "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 112 (1956).

In the present case, the Election Officer properly determined that the appropriate analysis for resolving the conflict between the complainants' right to campaign against incumbents and Yellow Freight's property interests is a balancing test in which the strength of the IBT member's right to engage in campaign activity, the strength of the employer's property right and the availability of a reasonable alternative means of communication are weighed against one another. *See Jean Country*, 291 NLRB No. 4 (1988). I agree that this balancing test is the proper analysis to apply to the present protests and any other similar conflicts that may arise between campaigning union members and employers.

With respect to the complainants, Patrick Clement and Robert McGinnis, both are announced candidates for delegates to the 1991 IBT International Convention. At the time in question, both candidates were engaging in campaign activity in an unfenced Yellow Freight parking lot reserved for visitors and loading dock employees. There are two other Yellow Freight parking lots nearby that are enclosed by a security fence. The candidates were campaigning at a pedestrian gate on Yellow Freight property through which most Yellow Freight employees pass. The candidates were instructed by the Chicago Ridge police to leave this parking lot and go to an area on the public sidewalk approximately 50 feet from the driveway entrance to the parking lot and farther away from the pedestrian gate.

With respect to the complainant Michael Hewer, at the time in question, the complainant was attempting to engage in campaign activity at the employee walk-through gate located on Yellow Freight property. The

parking lot at the Detroit facility is surrounded by a security fence which forces Yellow Freight employees to enter and exit through the main gate. On either side of this gate is a sidewalk which is located on public property. Yellow Freight security personnel instructed the complainant to leave Yellow Freight's property and restrict his campaign activities to public property.

In applying the balancing test to the competing interests of the complainants' right of access to Yellow Freight's property for campaign purposes and Yellow Freight's property interest in its Chicago Ridge Facility, the Election Officer found that Yellow Freight had violated the complainants' rights. I find that there is ample evidence to sustain the Election Officer's decision with regards to Yellow Freight's Chicago Ridge facility.[2]

The ability of IBT members to engage in campaign communications with their fellow IBT members at the employer's premises is a strong interest that is vital to the effective implementation of the Election Rules and to the success of the Consent Order. Yellow Freight's property interests in its Chicago Ridge facility varied among its different parking lots. Two of its parking lots are enclosed by a security fence evidencing a strong property interest. The parking lot on which the complainants were conducting their campaign activities, however, was not fenced.

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[2] Without determining what standard of evidence should be applied and where the burden of proof lies, I state here that, assuming the burden lies with the Election Officer (or protester) to establish the facts of the protest by a preponderance of the credible evidence, that burden has been sustained. As to the Detroit facility, the Election Officer properly determined that the protester had not established his claim.

Moreover, the complainants did not have a reasonable alternative means of communication off company property with IBT members at this facility. Therefore, in order to effectively communicate with IBT members employed at the Chicago Ridge facility, the complainants, non-employee IBT members, must be given a limited access to Yellow Freight's property for campaign purposes. In his remedy, the Election Officer gave Yellow Freight the option of permitting campaigning by non-employees at two different locations within the Chicago Ridge facility. I affirm this proposal.

In contrast, with regards to Yellow Freight's Detroit facility, the Election Officer determined that Yellow Freight's prohibition on solicitation by non-employees did not violate the complainant's rights under the Election Rules. I find that there is ample evidence to sustain the Election Officer's decision with regards to Yellow Freight's Detroit facility. While the complainant's interest in communicating with fellow IBT members is as strong here as at the Chicago Ridge facility, the complainant appears to have a reasonable alternative means of communicating with his fellow IBT members on the public sidewalk adjacent to the entrance to the fenced employee parking lot.

Accordingly, the decision of the Election Officer is affirmed in both cases.

/s/ Frederick B. Lacey
Frederick B. Lacey
Independent Administrator

Dated: January 23, 1991.

OFFICE OF THE ELECTION OFFICER
c/o INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001
(202) 624-8778
1-800-828-6496
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Michael H. Holland
Election Officer

Chicago Office
c/o Cornfield and Feldman
343 South Dearborn Street
Chicago, IL 60604
(312) 922-2800

January 3, 1991

VIA UPS OVERNIGHT

Robert McGinnis
6319 South Lavergne
Chicago, Illinois 60638

Patrick N. Clement
4688 South 112th Street
Greenfield, Wisconsin 53228

William D. Joyce
Secretary-Treasurer
IBT Local Union 710
4217 South Halsted
Chicago, Illinois 60609

Re: Election Office Case No. P-021-LU710-CHI
P-023-LU710-CHI

Gentlemen:

The above pre-election protests were filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election,* revised August 1, 1990 (*"Rules"*). Both protests concern the right of the protestors to engage in campaign activities with respect to the 1991 IBT International Union Convention delegate and International Union Officer election on the property of Yellow Freight Systems, Inc. at its Chicago Ridge, Illinois terminal.

Neither Mr. McGinnis or Mr. Clement are employees of Yellow Freight. Both however are members of IBT Local Union 710 which represents employees of Yellow Freight. It is undisputed that both were attempting to engage in campaign activities related to the International Union Delegate and Officer elections and were told by Yellow Freight's supervisory and/or security personnel that they could not engage in such activities on company property. Police officers were called to the scene who similarly instructed Messrs. McGinnis and Clement that they had to remain on public property when conducting their campaign activities.

Yellow Freight prohibits all distribution and solicitation by persons not employed by it on its property. Yellow Freight rules states as follows:

> "There shall be no distribution of literature or solicitation by non-employees in working or non-working areas during working or non-working times. In other words, non-employees are not allowed on company property for the purpose of distributing literature or soliciting."

It is the election Officer's position that such broad, non-solicitation, non-distribution rules is [sic] inappropriate. Such rule does not conport [sic] with substantive Federal law dealing with non-employee access to employer premises. Therefore, the rule is violative of Article VIII, §10(d) of the *Rules* prohibiting the placement of restrictions upon IBT members pre-existing rights to solicit support, distribute leaflets or literature, and engage in similar activities on employer premises.

Union members have a right protected by the National Labor Relations Act to engage in communications, solicitations and the like with respect to intra-Union affairs including intra-Union elections. *District Lodge 91, International Association of Machinist v. NLRB,* 814 F. 2nd 876 (2nd Cir. 1987); *NLRB v. Methodist Hospital of Gary, Inc.,* 732 F. 2nd 43 (7th Cir. 1984); ABF Freight System v. NLRB, 673 F. 2nd 229 (8th Cir. 1982).

Right to engage in such communications includes right to access of non-employees. Where denial of all access to the property of an employer would prevent effective communications with such employer's employees by non-employees, the employer's private property rights must accommodate the right to engage in such communication type activities. *Jean Country,* 291 NLRB No. 4 (1988). Since the substantive Federal right to engage in communication and solicitation includes the rights to engage in such communication and solicitations with respect to trade union election activities, the Employer's rights to private property must accommodate the right to engage in such campaign activities.

Property that is purely public cannot be controlled by the employer, who cannot interfere with protected activity including campaigning activities on such property. *Lechmere v. NLRB,* 914 F. 2nd 313 (1st Cir. 1990). An employer's private property rights with respect to property which is technically private, but open to the public such as shopping malls, access roads, and parking lots is normally insufficient to overrule the right of access by non-employees. Similarly, where the employer has traditionally permitted non-employees to engage in solicitation other than Union solicitation on its property, the

employer by practice has demonstrated that its private property interest is insufficient to override access rights for Union, intra-Union election purposes. *Even where the employer has restricted its property to access* by its employees only, such rights cannot outweigh the right of non-employees to have access to the property if no effective alternate means of communications exist. *Lechmere v. NLRB, supra.; Jean Country, supra.; Trident Seafoods Corp.* 293 NLRB 125 (1989). The alternate means must be reasonable, not overly costly or time-consuming and must generally permit face-to-face communications. *National Maritime Union v. NLRB,* 867 Fed. 2nd, 767 2nd Cir. (1989).

Thus, in the instant case, Yellow Freights' [sic] property interest must yield to a limited right of access by IBT members, not employed by Yellow Freight, if denying such access would prevent effective communications between IBT members not employed by Yellow Freight and those so employed.

The Election Officer's investigation determines that the Chicago Ridge, Illinois facility is located on the corner of Harlem Avenue and 103rd Street, Chicago Ridge, Illinois. Both streets are main and busy thoroughfares. The facility contains three (3) parking areas. Drivers park in a parking lot located on 103rd Street, but across that street from the main terminal facilities. There is a parking lot for visitors and dockmen located adjacent to Harlem Avenue. Office staff parking is located adjacent to 103rd Street.

Persons who park in the driver parking lots utilize an entrance or gate located along side the staff parking area for entry into the staff parking area and subsequent entry,

see below, to the terminal facilities. Unfortunately, there is no public sidewalk located on 103rd Street at that entrance nor is there a public sidewalk on the other side of 103rd Street adjacent to the drivers' parking lot.

The visitor and dockmen parking area, as well as the office staff parking area, are enclosed by a chain-link fence. This fence has a gate which provides access to an open area located between such parking lots and the terminal building itself. That gate is also the gate utilized by all persons who park in the driver parking lot for entry to the terminal facilities.

The only public areas for campaign purposes constitute a public sidewalk located along Harlem Avenue. Campaigning in such location would give access, however, to only cars entering the visitor and dockmen parking area. There is no public sidewalk located along 103rd Street which provides access to the pedestrian entrance for persons using the driver parking lot or the car entry for persons utilizing the staff parking area.

Campaigning along the public sidewalk would limit access only to those cars entering the visitor and dockmen parking lot. There would be no access to the Yellow Freight drivers or members of the office staff. Drivers constitute the largest group of IBT members employed by Yellow Freight.

There is an open area between the two parking lots bounded by Harlem Avenue and 103rd Street, i.e., the visitor and dockmen and office staff lots, and the actual terminal building itself. The gate from the office staff parking lot, utilized by employees to gain access tc the terminal building exits into this open area. Yellow Freight

has permitted some solicitation in this area during the Christmas season by United Way.

The Chicago Ridge, Illinois Yellow Freight facility prevents meaningful access to non-employees without access to Yellow Freight's property. Appropriate access, limiting intrusion on Yellow Freights' private property rights to the greatest extent possible, requires that non-employees be given access to the driver's parking lot located across the street from the terminal facilities on 103rd Street. Campaigning in such parking lot would provide access to the IBT drivers employed by Yellow Freight; the dockmen could be accessed by campaigning on the public sidewalk located along Harlem Avenue and adjacent to the driveway which leads into the dockmen's parking area from Harlem Avenue. Alternately, access could be provided by permitting campaigning in the open area located between the parking lots and the actual terminal building. The Election Officer views the second form of access to be somewhat more intrusive on Yellow Freights private property rights than merely permitting access to the driver parking lot.

The Election Officer has determined that meaningful access to IBT members at Yellow Freight cannot be provided without some limited intrusion upon Yellow Freight's private property rights. Such access is required by pre-existing subject Federal law and it is, therefore, a right granted to all IBT members under Article VIII, § 10(d) of the *Rules*. Yellow Freight, by interfering with access rights of IBT members, thus violated the election *Rules*. Therefore, the Election Officer directs that Yellow Freight shall permit IBT members, including those not employed by it, to have access to the driver parking lot.

Alternately, Yellow Freight, as its option, may grant access, in lieu of access to the parking lot, to the open area outside its terminal building. Yellow Freight shall notify the Election Officer within five (5) days of this decision as to whether it will grant access to the driver parking lot or to the open area outside the terminal building. To afford all Local 710 members knowledge of the limited right of access each has for campaigning purposes to the Chicago Ridge, Illinois Yellow Freight facility, the Election Officer will prepare a notice indicating the type of access permitted, which notice shall be sent to Local 710 for posting by it on all Local Union bulletin boards.

The above protest also alleges that IBT members, other than the protestors and other than employees of Yellow Freight, have been discriminatory [sic] granted access while Yellow Freight has denied protestors such access. The Election Officer's investigation has not uncovered sufficient evidence to substantiate this allegation. Therefore, this portion of the protest is DENIED.

If any person is not satisfied with this determination, he may request a hearing before the Administrator within twenty-four (24) hours of his receipt of this letter. Such request shall be made in writing and shall be served on Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, N.J. 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing. The parties are reminded that

absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal.

Very truly yours,

/s/ Michael H. Holland
Michael M. Holland

MHH/BJH/sst

cc: Mr. Frederick B. Lacey

Julie Hamos
Yellow Freight Systems, Inc.
Chicago Ridge, Illinois

Daniel Hornbeck, Esq
Yellow Freight Systems, Inc.
P.O. Box 7563
10990 Roe Avenue
Overland Park, Kansas 66207

* * *

F. Court-Appointed Officers

12. The Court shall appoint three (3) officers – an Independent Administrator, an Investigations Officer and an Election Officer – to be identified and proposed by the Government and the union defendants, to oversee certain operations of the IBT as described herein. The parties shall jointly propose to the Court at least two persons for each of these three positions. Such proposal shall be presented to the Court within four weeks of the date of the entry of this order, except that for good cause shown such period may be extended by the Court. Except as otherwise provided herein, the duties of those three officers shall be the following:

(A) DISCIPLINARY AUTHORITY – From the date of the Administrator's appointment until the termination of the Administrator's authority as set forth in paragraph 3(3) herein, the Administrator shall have the same rights and powers as the IBT's General President and/or General Executive Board under the IBT's Constitution (including Articles VI and XIX thereof) and Title 29 of the United States Code to discharge those duties which relate to: disciplining corrupt or dishonest officers, agents, employees or members of the IBT or any of its affiliated entities (such as IBT Locals, Joint Councils and Area Conferences), and appointing temporary trustees to run the affairs of any such affiliated entities. The Investigations Officer shall have the authority to investigate the operation of the IBT or any of its affiliates and, with cause,

(i) To initiate disciplinary charges against any officer, member or employee of the IBT or

any of its affiliates in the manner specified for members under the IBT Constitution and,

(ii) To institute trusteeship proceedings for the purpose and in the manner specified in the IBT Constitution.

Prior to instituting any trusteeship proceeding the Investigations Officer shall notify the General President of the Investigations Officer's plan to institute said trusteeship proceeding and the basis therefor and give the General President ten (10) days to exercise his authority pursuant to the IBT Constitution to institute such trusteeship proceedings. If the General President timely institutes such proceedings and/or a trusteeship is imposed, the Investigations Officer and the Administrator shall have authority to review any action thus taken by the General President and/or any trusteeship imposed thereafter and to modify any aspect of either of the above at any time and in any manner consistent with applicable federal law. If the General President fails to institute trusteeship proceedings within the ten-day period prescribed herein, the Investigations Officer may immediately proceed in accordance with the authority specified above.

When the Investigations Officer files charges, the following procedures shall be observed:

(a) the Investigations Officer shall serve written specific charges upon the person charged;

(b) the person charged shall have at least thirty (30) days prior to hearing to prepare his or her defense;

(c) a fair and impartial hearing shall be conducted before the Administrator;

(d) the person charged may be represented by an IBT member at the hearing; and

(e) the hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

The Administrator shall preside at hearings in such cases and decide such cases using a "just cause" standard. The Investigations Officer shall present evidence at such hearings. As to decisions of the IBT General Executive Board on disciplinary charges and trusteeship proceedings during the Administrator's tenure, the Administrator shall review all such decisions, with the right to affirm, modify or reverse such decisions and, with respect to trusteeship proceedings, to exercise the authority granted above in this paragraph. Any decision of the Administrator shall be final and binding, subject to the Court's review as provided herein. For a period of up to fourteen (14) days after the Administrator's decision, any person charged or entity placed in trusteeship adversely affected by the decision shall have the right to seek review by this Court of the Administrator's decision. The Administrator shall also have the right to establish and disseminate new guidelines for investigation and discipline of corruption within the IBT. All of the above actions of the Administrator and Investigations Officer shall be in compliance with applicable Federal laws and regulations.

(B) REVIEW AUTHORITY – From the date of the Administrator's appointment until the certification of the IBT elections to be conducted in 1991, the Administrator

shall have the authority to veto whenever the Administrator reasonably believes that any of the actions or proposed actions listed below constitutes or furthers an act of racketeering activity within the definition of Title 18 U.S.C. § 1961, or furthers or contributes to the association directly, or indirectly, of the IBT or any of its members with the LCN or elements thereof:

> (i) any expenditures or proposed expenditure of International Union funds or transfer of International Union property approved by any officers, agents, representatives or employees of the IBT,
>
> (ii) any contract or proposed contract on behalf of the International Union, other than collective bargaining agreements, and
>
> (iii) any appointment or proposed appointments to International Union office of any officer, agent, representative or employee of the IBT.

In any case where the Administrator exercises veto authority, the action or proposed action shall not go forward. The Administrator, upon request of the IBT's General President or General Executive Board, shall, within three (3) days, advise the IBT's General President and/or General Executive Board whichever is applicable, of the reasons for any such veto. For a period of up to fourteen (14) days after the Administrator's decision, the IBT's President and/or General Executive Board shall have the right to seek review by this Court of the Administrator's decision. The Administrator may prescribe any reasonable mechanism or procedure to provide for the Administrator's review of actions or proposed actions by

the IBT, and every officer, agent, representative or employee of the IBT shall comply with such mechanism or procedure.

(C) ACCESS TO INFORMATION – (i) The Investigations Officer shall have the authority to take such reasonable steps that are lawful and necessary in order to be fully informed about the activities of the IBT in accordance with the procedures as herein established. The Investigations Officer shall have the right:

(a) To examine books and records of the IBT and its affiliates, provided the entity to be examined receives three (3) business days advance notice in writing, and said entity has the right to have its representatives present during said examination.

(b) To attend meetings or portions of meetings of the General Executive Board relating in any way to any of the officer's rights or duties as set forth in this Order, provided that prior to any such meeting, the officer shall receive an agenda for the meeting and then give notice to the General President of the officer's anticipated attendance.

(c) To take and require sworn statements or sworn in-person examinations of any officer, member, or employee of the IBT provided the Investigations Officer has reasonable cause to take such a statement and provided further that the person to be examined receives at least ten (10) days advance notice in writing and also has the right to be represented by an IBT member or legal counsel of his or her own choosing, during the course of said examination.

(d) To take, upon notice and application for cause made to this court, which shall include affidavits in support thereto, and the opportunity for rebuttal affidavits, the sworn statements or sworn in person examination of persons who are agents of the IBT (and not covered in subparagraph (c) above).

(e) To retain an independent auditor to perform audits upon the books and records of the IBT or any of its affiliated entities (not including benefit funds subject to ERISA), provided said entity receives three (3) business days advance notice in writing and said entity has the right to have its representative present during the conduct of said audit.

(ii) The Independent Administrator and the Election Office shall have the same rights as the Investigations Officer as provided in sections (a), (b), (c) and (d) of A, herein.

(iii) The Independent Administrator, Investigations Officer and Election Officer shall each be provided with suitable office space at the IBT headquarters in Washington, D.C.

D. IBT ELECTION – The IBT Constitution shall be deemed amended, and is hereby amended, to provide for the following new election procedures:

(i) The procedures described herein shall apply to elections of the IBT's General President, General Secretary-Treasurer, International Union Vice Presidents, and International Union Trustees;

(ii) Delegates to the IBT International convention at which any International Union officers are nominated or elected shall be chosen by

direct rank-and-file secret balloting shortly before the convention (but not more than six months before the convention, except for those delegates elected at local union elections scheduled to be held in the fall of 1990), and with all convention Candidate election voting by secret ballot of each delegate individually;

(iii) Delegates shall nominate candidates for eleven (11) Regional Vice Presidents, as follows: Three (3) from the Eastern Conference, three (3) from the Central Conference, two (2) from the Southern Conference, two (2) from the Western Conference, and one (1) from the Canadian Conference. In addition, there shall be nominated candidates for five (5) Vice Presidents to be elected at large. All duly nominated Vice Presidents shall stand for election conducted at local unions on the same ballot and time as the election of General President and General Secretary-Treasurer, as provided herein;

(iv) At such an International convention, after the nomination of International Union Vice Presidents and election of Trustees, all delegates shall then vote for nominees for the offices of IBT General President and Secretary-Treasurer;

(v) To qualify for the ballot for the direct rank-and-file voting for IBT General President, Secretary-Treasurer, and Vice President, candidates must receive at least five (5) percent of the delegate votes at the International convention, for the at large position, or by conference for regional positions, as the case may be;

(vi) No person on the ballot for the position of IBT General President may appear on the ballot in the same election year for the position of Secretary-Treasurer; and further no member

shall be a candidate for more than one (1) Vice President position;

(vii) No less than four (4) months and no more than six (6) months after the International convention at which candidates were nominated, the IBT General President, General Secretary-Treasurer and Vice Presidents shall be elected by direct rank-and-file voting by secret ballot in unionwide, one-member, one-vote elections for each at large position, and conference wide, one-member one-vote elections for each regional position;

(viii) All direct rank-and-file voting by secret ballot described above shall be by in-person ballot box voting at local unions or absentee ballot procedures where necessary, in accordance with Department of Labor regulations; and

(ix) The current procedures under the IBT Constitution for filling a vacancy between elections in the office of General Secretary-Treasurer, International Trustee, and International Vice President shall remain in effect.

The Election Officer shall supervise the IBT election described above to be conducted in 1991 and any special IBT elections that occur prior to the IBT elections to be conducted in 1991. In advance of each election, the Election Officer shall have the right to distribute materials about the election to the IBT membership. The Election Officer shall supervise the balloting process and certify the election results for each of these elections as promptly as possible after the balloting. Any disputes about the conduct and/or results of elections shall be resolved after hearing by the Administrator.

The union defendants consent to the Election Officer, at Government expense, to supervise the 1996 IBT elections. The union defendants further consent to the U.S. Department of Labor supervising any IBT elections or special elections to be conducted after 1991 for the office of the IBT General President, IBT General Secretary-Treasurer, IBT Vice President, and IBT Trustee.

At the IBT 1991 International Convention, the delegates shall be presented with these aforesaid amendments for vote; provided further that nothing herein shall be deemed or interpreted or applied to abridge the Landrum-Griffin free speech right of any IBT officer, delegate or member, including the parties hereto.

(E) REPORTS TO MEMBERSHIP – The Administrator shall have the authority to distribute materials at reasonable times to the membership of the IBT about the Administrator's activities. The reasonable cost of distribution of these materials shall be borne by the IBT. Moreover, the Administrator shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations Officer and Election Officer.

(F) REPORTS TO THE COURT – The Administrator shall report to the Court whenever the Administrator sees fit but, in any event, shall file with the Court a written report every three (3) months about the activities of the Administrator, Investigations Officer and Election Officer. A copy of all reports to the Court by the Administrator shall be served on plaintiff United States of America, the IBT's General President and duly designated IBT counsel.

(G) HIRING AUTHORITY – The Administrator, the Investigations Officer and the Election Officer shall have the authority to employ accountants, consultants, experts, investigators or any other personnel necessary to assist in the proper discharge of their duties. Moreover, they shall have the authority to designate persons of their choosing to act on their behalf in performing any of their duties, as outlined in subparagraphs above. Whenever any of them wish to designate a person to act on their behalf, they shall give prior written notice of the designation to plaintiff United States of America, and the IBT's General President; and those parties shall then have the right, within fourteen (14) days of receipt of notice, to seek review by this Court of the designation, which shall otherwise take affect fourteen (14) days after receipt of notice.

(H) COMPENSATION AND EXPENSES – The compensation and expenses of the Administrator, the Investigations Officer and the Election Officer (and any designee or persons hired by them) shall be paid by the IBT. Moreover, all costs associated with the activities of these three officials (and any designee or persons hired by them) shall be paid by the IBT. The Administrator, Investigations Officer and Election Officer shall file with the Court (and serve on plaintiff United States of America and the IBT's General President and designated IBT counsel) and application, including an itemized bill, with supporting material, for their services and expenses once every there months. The IBT's General President shall then have fourteen (14) business days following receipt of the above in which to contest the bill before this Court. If the IBT's President fails to contest such a bill within that 14-day period, the IBT shall be obligated to pay the bill.

In all disputes concerning the reasonableness of the level or amount of compensation or expense to be paid, the Court and parties shall be guided by the level of payment as authorized and approved by the IBT for the payment of similar services and expenses.

(I) APPLICATION TO THE COURT – The administrator may make any application to the Court that the Administrator deems warranted. Upon making any application to the Court, the Administrator shall give prior notice to plaintiff United States of America, the IBT's General President and designated IBT counsel and shall serve any submission filed with the Court on plaintiff United States of America, the IBT's General President and designated IBT counsel. Nothing herein shall be construed as authorizing the parties or the Court-appointed officers to modify, change or amend the terms of this Order.

G. Independent Review Board

Following the certification of the 1991 election results, there shall be established an Independent Review Board, (hereinafter, referred to as the "Review Board"). Said Board shall consist of three members, one chosen by the Attorney General of the United States, one chosen by the IBT and a third person chosen by the Attorney General's designee and the IBT's designee. In the event of a vacancy, the replacement shall be selected in the same manner as the person who is being replaced was selected.

(a) The Independent Review Board shall be authorized to hire a sufficient staff of investigators and attorneys to investigate adequately (1) any allegations of

corruption, including bribery, embezzlement, extortion, loan sharking, violation of 29 U.S.C. §530 of the Landrum Griffin Act, Taft-Hartley Criminal violations or Hobbs Act violations, or (2) any allegations of domination or control or influence of any IBT affiliate, member or representative by La Cosa Nostra or any other organized crime entity or group, or (3) any failure to cooperate fully with the Independent Review Board in any investigation of the foregoing.

(b) The Independent Review Board shall exercise such investigative authority as the General President and General Secretary-Treasurer are presently authorized and empowered to exercise pursuant to the IBT Constitution, as well as any and all applicable provisions of law.

(c) All officers, members, employees, and representatives of the IBT and its affiliated bodies shall cooperated fully with the Independent Review Board in the course of any investigation or proceeding undertaken by it. Unreasonable failure to cooperate with the Independent Review Board shall be deemed to be conduct which brings reproach upon the IBT and which is thereby within the Independent Review Board's investigatory and decisional authority.

(d) Upon completion of an investigation, the Independent Review Board shall issue a written report detailing its findings, charges, and recommendations concerning the discipline of union officers, members, employees, and representatives and concerning the placing in trusteeship of any IBT subordinate body. Such written reports shall be available during business hours for public inspection at the IBT office in Washington, D.C.

(e) Any findings, charges, or recommendations of the Independent Review Board regarding discipline or trusteeship matters shall be submitted in writing to an appropriate IBT entity (including designating a matter as an original jurisdiction case for General Executive Board review), with a copy sent to the General President and General Executive Board. The IBT entity to which a matter is referred shall thereupon promptly take whatever action is appropriate under the circumstances, as provided by the IBT Constitution and applicable law. Within 90 days of the referral, that IBT entity must make written findings setting forth the specific action taken and the reasons for that action.

(f) The Independent Review Board shall monitor all matters which it has referred for action if, in its sole judgment, a matter has not been pursued and decided by the IBT entity to which the matter has been referred in a lawful, responsible, or timely manner, or that the resolution proposed by the relevant IBT entity is inadequate under the circumstances, the Independent Review Board shall notify the IBT affiliate involved of its view, and the reasons therefor. A copy of said notice shall be sent by the Independent Review Board, to the General President and the General Executive Board.

(g) Within 10 days of the notice described in paragraph (f) above, the IBT entity involved shall set forth in writing any and all additional actions it has taken and/or will take to correct the defects set forth in said notice and a deadline by which said action may be completed. Immediately thereafter, the Independent Review Board shall issue a written determination concerning the adequacy of the additional action taken and/or proposed by

the IBT entity involved. If the Independent Review Board concludes that the IBT entity involved has failed to take or propose satisfactory action to remedy the defects specified by the Independent Review Board's notice, the Independent Review Board shall promptly convene a hearing, after notice to all affected parties. All parties shall be permitted to present any facts, evidence, or testimony which is relevant to the issue before the Independent Review Board. Any such hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

(h) After a fair hearing has been conducted, the Independent Review Board shall issue a written decision which shall be sent to the General President, each member of the General Executive Board, and all affected parties.

(i) The decision of the Independent Review Board shall be final and binding, and the General Executive Board shall take all action which is necessary to implement said decision, consistent with the IBT Constitution and applicable Federal laws.

(j) The Independent Review Board shall have the right to examine and review the General Executive Board's implementation of the Independent Review Board's decisions; in the event the Independent Review Board is dissatisfied with the General Executive Board's implementation of any of its decisions, the Independent Review Board shall have the authority to take whatever steps are appropriate to insure proper implementation of any such decision.

(k) The Independent Review Board shall be apprised of and have the authority to review any disciplinary or trusteeship decision of the General Executive Board, and shall have the right to affirm, modify, or reverse any such decision. The Independent Review Board's affirmance, modification, or reversal of any such General Executive Board decision shall be in writing and final and binding.

(l) The IBT shall pay all costs and expenses of the Independent Review Board and its staff (including all salaries of Review Board members and staff). Invoices for all such costs and expense shall be directed to the General President for payment.

(m) The Investigations Officer and the Administrator shall continue to exercise the investigatory and disciplinary authority set forth in paragraph 12 above for the limited period set forth in paragraph 3(3) above, provided, however, that the Investigations Officer and the Administrator may, instead, refer any such investigation or disciplinary matter to the Independent Review Board.

(n) The IBT Constitution shall be deemed and hereby is amended to incorporate all of the terms relating to the Independent Review Board set forth above in this paragraph. This amendment shall be presented to the delegates to the 1991 Convention for vote.

ELECTION CONDUCT PROTEST FORM

ELECTION OFFICER FORM 4

IMPORTANT NOTICE: This form is for the filing of protests concerning any activity relating to nominations or elections for Local Union Delegates or for International Officers.

All protests regarding rulings on nominator, seconder or candidate eligibility, failure to provide access, and improper or inequitable treatment *must be filed within 48 hours of the occurrence of the act being protested.*

Other protests may be filed immediately or pursuant to a post-election protest.

Protests regarding any alleged improper election day or post-election conduct must be filed in the following manner:

For Delegate Elections: within seventy-two (72) hours of the posting of the official election tally sheet; or

For International Officer Elections: within fifteen (15) days of the announcement of the election results.

See the reverse side for instructions on filing this complaint with the Election Officer and serving it on the Union(s) Involved. ALSO SEE Article XI of the "Rules for the IBT International Union Delegate and Officer Election" promulgated on April 27, 1990 by Michael H. Holland, Election Officer.

Election Officer File No. _____
[to be completed only by Election Officer Staff]

Part 1: *NAME OF PERSON MAKING PROTEST*

NAME: Patrick H. Clement
ADDRESS: 4688 S. 112 St.
Greenfield, WI 53228

PHONE: (414) 425-9698
IBT LOCAL UNION #: 710

Part 2: PERSON(S) OR ORGANIZATION(S) AGAINST WHOM PROTEST IS BEING FILED
[Include addresses, phone numbers, and Local Union Affiliations, if known]

Local 710, Chicago and Yellow Freight System Chicago Ridge, Il.

Part 3. DESCRIPTION OF PROTEST. Provide a concise description of the alleged improper conduct.

See attached letter

[continue your description, or attach any additional information, as required]

VERIFICATION

I declare that this protest (including any accompanying schedules or statements) has been examined by me to the best of my knowledge and belief is a true and correct complaint.

10/22/90
Date

/s/ Patrick H. Clement
Signature of Person
Making Complaint

INSTRUCTIONS FOR FILING

This protest must be sent to the Election Officer by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter. It must be sent within the time limits prescribed by Article XI, Sections a.(1), a.(2), and b.(1) of the "Rules for the IBT International Union Delegate and Officer Election" promulgated on April 27, 1990 by Michael H. Holland, Election Officer (see the notice on the front side of this form for the generally applicable time limits for the filing of protests). A copy of this complaint must also be sent to the Union(s) involved in the same manner and within the same time frame as the original. Send this protest, along with all attachments, to:

Michael H. Holland, Election Officer, c/o IBT, 25 Louisiana Avenue, N.W., Washington, DC 20001. Telephone and fax numbers are: 1-800-828-8498 1-202-624-7887:

Part 3: DESCRIPTION OF PROTEST.

On Saturday, 10/20/80, at about 12:00 p.m., members of the "New Eagles for Ron Carey" slate were interfered with by management personnel from Yellow Freight Systems, at the request of unnamed union representatives.

Mr. Bob Zbonski, a Supervisor at Yellow Freight System's Break-Bulk Terminal at 103rd & Harlem Road in Chicago Ridge, IL, approached me and asked what we were doing.

I asked him if he was a 710 member and he said that he wasn't. I then explained that we were delegate candidates and that we were collecting signatures from fellow 710

members on a petition for an "All Mail Ballot" for the delegate election.

Bob said that we were on private property and that we would have to leave (we were in the parking lot around the area that's labeled "VISITORS" p king).

I stated to him that we were only interested in getting signatures from 710 members and that we had no interest or dispute with Yellow Freight Systems, but that if he continued to interfere with us, we would bring charges against him and/or Yellow Freight System for a violation of Federal Law against employer contributions in a union election. He then walked away.

A few minutes later he returned and said, "If you want to get signatures from 710 members, you should go down to the Hall and get them from there."

I told him, "That's no good, most of the members don't even go to any of the Union meetings and we have to go to where the members are like here at Yellow were [sic] they're working."

Then he stated, "Well the union steward's upset about you being out here talking to his people."

I told him, "If the steward doesn't like it, then tell him to come our [sic] here himself."

He said, "Unless you guys get off of our property and stay over there (he pointed to an area across 103rd street), that they were going to call the police and have us arrested for trespassing."

It was now clear to us that (Yellow) was acting on the behalf of the union steward and that that indicated that

Yellow was aiding the Local by interfering with us and that *is a violation of Federal Law*!

Fellow slate member Dan Tuffs and Bob McGinnis who was working with me, both walked off of the parking lot while I remained there and continued to ask for signatures. Later they walked back on the parking lot to help again.

Two Chicago Ridge Police cars arrived. Officers Baldermann, badge #122 and Officer Ludwig, badge #114 got out of their squads and talked to us. I stated to them that we had the right to be in the *public access parking lot* in order to access 710 members at Yellow's worksite.

Officer Ludwig kept asking me, if we had the right to picket on Yellow's property.

I told him every time that we weren't picketing Yellow and that that wasn't the issue here, the issue was our rights as delegate candidates to campaign at a plant gate.

The police didn't understand our rights to be there and after a few minutes of discussion, they instructed us to "Stay off of the pavement and keep on the grass (a three foot wide strip of grass between the pavement and the curb." There was a complaint filed with the Chicago Ridge Police, #1480-09495-1020, but we weren't able to get a copy in time to send with this protest.

We tried to continue collecting signatures, but the restriction of having to stand some 50 feet away from the entrance/exit gate resulted in a drop in members who were willing to sign to about 30% of those who were available.

Before we were made to move, we were getting around 85% participation from 710 members coming to and going from work.

Because of the time limit set by Julie Hamos, the regional coordinator, in which we could collect signatures, we are unable to get all who might want to sign for an "All Mail Ballot".

Now because of the involvement of the Chicago Ridge Police, many 710 members at this Yellow Freight System facility are going to be afraid to even be seen talking to us, by either Yellow Freight System management personnel, or 710 stewards and/or other 710 members who are loyal to the currant local regime.

Some Yellow Freight Employees told us that petitions for Daniel Ligurotis have been circulated by stewards inside of the fence, on company property in past weeks. God only knows what else has been going on because we can't police every barn or every worksite.

At the very least, we should be able to access other members in the parking lots and outside of any plant gates!

ELECTION CONDUCT PROTEST FORM

ELECTION OFFICER FORM 4

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Election Officer File No. _____
[to be completed only by Election Officer Staff]

Part 1: *NAME OF PERSON MAKING PROTEST*

NAME: ROBERT McGINNIS
ADDRESS: 6319 S LAVERGNE
CHICAGO, ILL 60638

PHONE: (312) 585-8193
IBT LOCAL UNION #: 710

Part 2: *PERSON(S) OR ORGANIZATION(S) AGAINST WHOM PROTEST IS BEING FILED*
[Include addresses, phone numbers, and Local Union Affiliations, if known]

YELLOW FREIGHT SYSTEM, YELLOW FREIGHT, UNITED PARCEL SERVICE, UNITED PARCEL SERVICE INC., MR. DANIEL LIGUROTIS, 10th VICE PRESIDENT INTERNATIONAL, BROTHERHOOD OF TEAMSTERS, SEE ATTACHED COMPLAINT LETTERS DATED 10-23-90

[*THIS FORM CONTINUES ON THE REVERSE SIDE AND IS NOT VALID UNLESS SIGNED*]

Chicago Ill.
October 23 1990

Mr. Michael Holland
Election Officer
C\O International Brotherhood of Teamsters
25 Louisiana Ave N.W.
Washington D.C. 20001

Re: ELECTION CONDUCT PROTEST

On October 22 1990 at United Parcel Service facility at Bedford Park union stewards were circulating accredited candidate petitions and getting signatures on the petitions on behalf of Mr. Daniel Ligurotis and his slate. These stewards were being paid by United Parcel Service at the time. They also were getting signatures of employees who were working at the time. They were soliciting workers at that time also.

This also happened at Yellow Freight System also. It probably is happening at all employers who are under Mr. Ligurotis' jurisdiction.

On Saturday October 21 1990 three of us were at 103rd and Harlem trying to get petitions for an all mail ballot election in local 710. A member of management came out into the parking lot and talked to me. I asked him if I was bothering anything he said no and went back into the

terminal. A short time later the Chicago Ridge police came and threatened us with arrest if we didn't leave the parking lot. Mr. Holland I am in the process of writing a letter to MS. [sic] Hamos pleading for an all mail ballot in these two corrupt locals. The rank and file don't have no faith in even the consent order as they thought the evidence against Mr. Ligurotis should've been sufficient to have him removed from office. Instead Mr. Ligurotis can get his cronies and stoolies to violate the consent degree with this accredited candidate petition. This isn't fair to any of us who did go out and get legitimate petitions signed to have Mr. Carey and others accredited under your and the courts rules. This is not fair to any teamster who wants to run for any International position he cannot get accredited petitions signed in the same manner as Mr. Ligurotis and his slate. This is deliberate contempt of the consent degree [sic] on Mr. Ligurotis' part in my opinion. This is also contempt plus collusion on the above employers part it also coerces people from getting involved in union elections.

I am including a letter dated 10 23 90 to MS. [sic] Hamos as part of this protest [note the El Rukin comments and consult with Ms Robin Potter and the F.B.I. about them in past local 705 election complaints.

copies to Judge Edelstein, Mr Carberry and Mr Lacey

October 23 1990
Chicago Ill.

Ms. Julie Hamos
Suite 1850
122 S. Michigan Ave
Chicago Ill

Dear Ms. Hamos:

I talked to you on Wednesday Oct 17 1990 about getting petitions for an all mail ballot in the local 710 delegate election. You asked me to send material to support my pleas..

On Sat. Oct 20 1990 we went to some worksites of employers to get petitions for an all mail ballot signed. As I pointed out to you we the dissidents don't have the same rights to campaign as the incumbents. We were in the parking lot outside the company fence trying to get 710 employees to sign our petitions. This was at Yellow Freight System. The Supervisor on that shift came out in the parking lot and told us to get off their property. I asked him if he thought we were bothering anyone, if we were harming anyone or anything he replied no we weren't. He informed me that someone told him to get us out of there he didn't say who it was. We told him we weren't bothering anyone and that 710 officials campaign inside and that we believed we should be entitled to do our petitions outside their fence.

He then went inside the terminal and called the Chicago Ridge Police. They came and threatened to arrest us if we didn't get out of the parking lot. By having the police chase us it intimidated people getting off their shift from signing our petitions and the way that they would

have to sign the petitions out in the middle of the street if they weren't afraid. The supervisor that called the police told Pat Clements that a 710 steward told him to call the police to chase us. There is a police complaint # sent to Mr. Holland.

I am sending along with this statement a copy of my post election protest dated Sept. 23 1985, that also was a pre election protest in the 1985 710 election. On page 5 the last paragraph it states that we weren't allowed to campaign at certain employers premises. At that time we were at the very same place as we were Saturday. We took pictures of local 710 business agents campaigning at the very spot where we were chased from by the police at the request of the Yellow 710 stewards. In 1985 one Yellow member of management whom I worked for wished me [sic] shook hands with me one hour before their 710 stewards called the police to run us off. This member of management had no objections of us campaigning in the parking lot. The D.O.L. has the pictures of the 710 cars and buisness [sic] agents campaigning at that site. The Irony of all of this is we had Yellow employees on our slate and they weren't even allowed to campaign at their own employers locker rooms and non work areas.

In my conversation with you I told you Local 705 could never have a fair election if there were not an all mail ballot election and the nomination meeting of officers backed up my experience and statement.

Friends of mine told me what happened there last Thursday. These people really want to oust the corrupt officers from local 705 they don't want to be at the same

time martyrs, jobless, hospital patients, and have their families threatened.

One friend of mine told me

1. That the place was jammed even the aisles hindering anyone who even had intentions of nominating an opposition slate to Ligurotis. If there were opposition they would've had to run the gauntlet or walk the plank so to speak.

2. That their [sic] were El Ruken like characters guarding or surrounding my friend. In sworn testimony Local 705 used El Ruken members to intimidate voter members in past elections. Ms. Robin Potter I believe brought this out to the authorities in past elections as it was also brought out in past election protests. This is intimidation in any language. The fact that they have used El Ruken members to harass dissidents can easily be proven through their payroll records not LM2 records but by checking the checks in their logbook of their checking account. The local 710 tactic similar to this at nomination meetings they use only one microphone in the center aisle and before the doors are open on that day the business agents, organizers and their goons sit where the dissidents usually sit only they control the aisles and acess [sic] to the microphone as does one organizer who has physical control of the microphone plus the chairman at the podium controls the mike volume. Some intended delegate candidates from local 135 in Indianapolis can readily support this last statement in the 1985 710 election which they came up with their friends who were running, one person who is over 6 feet tall and weighs over 225 lbs

told me and others at a Ron Carey meeting in Indianapolis that "in the nomination meeting in 1985 at local 710 he never was so scared in his life by the intimidation and that he would never go through that again. Ms. Hamos if you want his name it and a statement can easily be got through Mr. Hollands coordinator in Indianapolis Ms. Peggy Hillman.

3. At the 705 nomination meeting there was no order the people attending couldn't hear what was going on with the noise. They did hear that Ligurotis was going to run on a slate in the election of International Officers. The very next day he had business agents organizers stewards out getting petitions signed while they were on the payroll of companies or the local on Monday Oct 22 1990 United Parcel local 705 stewards were getting accredited candidate petitions for Ligurotis and his slate how can dissidents compete with this? They also were at Yellow Freight System doing the same thing and the company called the police to get us not off the company work area but their parking lot outside a fence that separates the parking area from the work area where they let the incumbents And [sic] their agents get petitions signed. This is my opinion is a consent degree [sic] violation on Mr. Ligurotis' part. It shows again his outward contempt toward the consent degree [sic] and Judge Edelstein for the second time.

Enclosed in support for an all mail ballot in the Chicago area are

Sept 23 1985 Protest letter
Sept 16 1988 Protest letter
See McGinnis et al V LOcal [sic] 710 83c 8623

See McGinnis, McGury, O'Conner, and Kiley Deposition in McLauglin Secretary of Labor V Local 710 86c 1804 Protest dated 10 23 90 to Michael Holland

Sincerely
/s/ Robert McGinnis
Robert McGinnis
6319 S.Lavergne
Chicago Ill 60638

ELECTION CONDUCT PROTEST FORM

ELECTION OFFICER FORM 4

RECEIVED
DEC 26 1990

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Election Officer File No. _____
[to be completed only by Election Officer Staff]

Part 1: *NAME OF PERSON MAKING PROTEST*

NAME: MIKE HEWER
ADDRESS: 11656 BROWNELL
PLYMOUTH, Mi 48170

PHONE: 313-453-4324
IBT LOCAL UNION #: 299

Part 2: *PERSON(S) OR ORGANIZATION(S) AGAINST WHOM PROTEST IS BEING FILED*
[Include addresses, phone numbers, and Local Union Affiliations, if known]

YELLOW FREIGHT SYSTEMS 7701 W. JEFFERSON DETROIT Mi 48216

ON DEC. 21 1990 AT 7 30 AM JIM McTAGGART AND I WERE TOLD WE COULD NOT CAMPAIGN AT THE EMPLOYEE WALKTHROUGH GATE AND WE WOULD HAVE TO

[THIS FORM CONTINUES ON THE REVERSE SIDE AND IS NOT VALID UNLESS SIGNED]

Part 3. *DESCRIPTION OF PROTEST.* Provided a concise description of the alleged improper conduct.

STAND AT THE ROADSIDE CURB AND NOT ON THEIR PROPERTY THIS REQUEST WAS FROM JAMES TAIT, NATION WIDE SECURITY UNDER ORDERS FROM BOB JONES, MANAGER OF YELLOW FREIGHT. NOTE – NO SECURITY AT ROADSIDE, ONLY AT WALKTHROUGH GATE EMPLOYEE PARKING LOT IN UNSECURED

AS A RESULT OF THIS ACTION WE COULD NOT EFFECTIVELY CAMPAIGN AT THIS FACILITY AS THE MEMBERS WERE STILL IN THEIR CARS. I ESTAMATE [sic] THEIR ARE 500 LOCAL 299 MEMBERS AT THIS FACILITY.

[*continue your description, or attach any additional information, as required*]

VERIFICATION

I declare that this protest (including any accompanying schedules or statements) has been examined by me and to the best of my knowledge and belief is a true and correct complaint.

12-21-90
Date

/s/ Mike Hewer
Signature of Person Making Complaint

INSTRUCTIONS FOR FILING

This protest must be sent to the Election Office by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately

thereafter. It must be sent within the time limits prescribed by Article XI, Sections a.(1), a.(2) and b.(1) of the "Rules for the IBT International Union Delegate and Officer Election" promulgated on April 27, 1990 by Michael H. Holland, Election Officer (see the notice on the front side of this form for the generally applicable time limits for the filing of protests). A copy of this complaint *must also* be sent to the Union(s) Involved in the same manner and within the same time frame as the original. Send this protest, along with all attachments, to:

Michael H. Holland, Election Officer, c/o IBT, 25 Louisiana Avenue, N.W., Washington, DC 20001. Telephone and fax numbers are: 1-800-828-6496; 1-202-624-7887; 1-202-824-9792 (fax).

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of December, one thousand nine hundred and ninety-one.

USA

PLAINTIFF-APPELLEE,

V.

IBT

DEFENDANTS

DOCKET NUMBER 91-6096

(Filed Dec. 31, 1991)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by APPELLANT YELLOW FREIGHT SYSTEMS INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing in DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

by: /s/ Carolyn Clark Campbell

SUPREME COURT OF THE UNITED STATES

No. A-623

Yellow Freight System, Inc.,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 29, 1992.

/s/ Clarence Thomas
Associate Justice of the Supreme Court of the United States

Dated this 26th

day of February, 1992.

RULES FOR THE IBT INTERNATIONAL UNION DELEGATE AND OFFICER ELECTION

(Revised August 1, 1990)

MICHAEL H. HOLLAND
ELECTION OFFICER

* * *

ARTICLE VIII

CAMPAIGNING AND ACCESS

10. Freedom to Exercise Political Rights

a. All Union members retain the right to participate in campaign activities, including the right to run for office, to openly support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions. No candidate or member may campaign during his/her working hours. Campaigning incidental to work is not, however, violative of this section. Further, campaigning during paid vacation, paid lunch hours or breaks, or similar paid time off is also not violative of this section.

b. All Union officers and employees, if members, retain the right to participate in campaign activities, including the right to run for office, to openly support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions. However, such campaigning must not involve the expenditure of Union funds. Accordingly, members officers and employees of the Union may not campaign on time that is paid for by the Union. Campaigning incidental to regular Union business is not, however, violative of this section. Further, campaigning during paid vacation, paid lunch

hours or breaks, or similar paid time off is also not violative of this section.

c. Union funds, facilities, equipment, stationery, etc. may not be used to assist in campaigning unless the candidate reimburses the Union for such costs and such goods and services are equally available to all candidates and all candidates are notified in advance of the availability of such goods and services.

d. No restrictions shall be placed upon candidates' or members' pre-existing rights to use employer or Union bulletin boards for campaign publicity. Similarly, no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events or engage in similar activities on employer or Union premises. Such facilities and opportunities shall be made equally availa-

* * *

ARTICLE XI

PROTEST AND APPEAL PROCEDURES; REMEDIES; RERUN ELECTIONS

1. Protests and Appeals

a. Preelection Protests

Preelection protests shall be processed in the following manner:

(1) Protests regarding the following *must* be filed within forty-eight (48) hours or such protests shall be waived:

(a) Protests regarding rulings on nominator, seconder or candidate eligibility;

(b) Protests regarding alleged failures to provide proper access to the membership, including alleged violations of the rules regarding access to collective bargaining agreements or worksite lists, to Union meetings and publications, or to employer premises; and

(c) Protests regarding alleged improper or inequitable treatment of the candidate or his/her supporters by the Union, by any other labor organization or by any employer, including improper handling of the candidate's request for mailings by the Union, improper or inequitable denial of access to the membership or to relevant information by the Union, by any other labor organization or by an employer, and improper or inequitable aid or support, financial or otherwise, given or denied, a candidate or his/her supporters by the Union, by any other labor organization or by an employer.

(2) Protests regarding alleged improper pre-election threats, coercion, intimidation or acts of violence *may* be filed within forty-eight (48) hours or *may* be filed as a post-election protest pursuant to Subsection "b" of this Article, as if the event complained of occurred on election day.

(3) All preelection protests shall be filed by sending the Election Officer or his representative and the Union(s) involved a clear and concise written statement of the alleged improper conduct. Such statement shall be delivered to the Election Officer or his representative and to such Union(s) by personal delivery,

by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limits prescribed by Paragraphs (1) and (2) above and shall include the name(s), address(es), telephone number(s), and Local Union number(s) of the complainant(s).

(4) Within five (5) days after receipt of the protest, the Election Officer or his representative shall evaluate the protest and shall:

(a) determine the merits of the protest and, if found meritorious, determine the appropriate remedy;

(b) defer making a determination until after the election and thereby treat the matter as a post-election protest pursuant to Subsection "b" of this Article, as if such protest was filed on election day; or

(c) with respect to protests regarding rulings on nominator, seconder or candidate eligibility, the Election Officer retains the authority to have the International Union obtain and provide information necessary to assist in resolving the protest.

In any case, the Election Officer or his representative shall notify the complainant(s), the Union(s) involved, any candidate(s) adversely affected, and the Administrator of his decision within the time limit prescribed above.

(5) For all protests not deferred, the complainant(s), the Union(s) involved or any adversely affected candidate(s) not satisfied with the resolution may request a hearing before the Administrator within twenty-four (24) hours after receiving notice of the determination. Such

request shall be made in writing and shall be delivered to the Administrator or his designee and to all other parties to the dispute by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limit prescribed above, with a copy of the original protest attached.

(6) If no appeal is taken from the determination of the Election Officer or his representative, that determination shall become final and binding.

(7) Within three (3) days after receipt of a request for hearing, the Administrator or his designee shall commence and conclude a hearing at a location and in a manner that he determines most appropriate to fully elicit all relevant facts and information necessary to determine the appeal within the three (3) day period. The following individuals may be present at such hearing: the complainant(s) and/or his/her representative(s); any representative(s) of the Union(s) involved; the election Officer or his representative; the person(s) filing the appeal, if other than the complainant(s), and/or his/her representative(s); and any other person who obtains the permission of the Administrator or his designee.

At each such hearing, the Election Officer or his representative shall present to the Administrator or his designee a summary of the original determination, including a statement of the facts found, the resolution reached and the basis for that resolution.

(8) Within forty-eight (48) hours after the conclusion of such hearing, the Administrator or

his designee shall issue a written decision, making whatever findings and ordering whatever relief is appropriate to resolve the appeal. The decision must be followed unless it is stayed or overturned by the Court.

b. Post-election Protests

Post-election protests shall be processed in the following manner:

(1) Protests regarding *any* alleged improper election day or post-election conduct or event *must* be filed:

(a) within seventy-two (72) hours of the posting of the official election tally sheet, when involving any delegate election; or

(b) within fifteen (15) days of the announcement of the election results, when involving the International Officer election.

If the above time limits are not met, the protest shall be waived.

(2) Post-election protests shall only be considered and remedied if the alleged violation may have affected the outcome of the election.

(3) All post election protests shall be filed by sending the Election Officer or his representative a clear and concise written statement of the alleged improper conduct, including a statement explaining how such conduct may have affected the outcome of the election. Such statement shall be delivered to the Election Officer or his representative and to the Union(s) involved by personal delivery, by overnight mail, or by

facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limits prescribed by Paragraph (1) above and shall include the name(s), address(es), telephone number(s), and Local Union number(s) of the complainant(s).

(4) Within seven (7) days after the filing of a protest under Paragraph (1)(a) above (concerning a delegate election) or within fifteen (15) days after the filing of a protest under Paragraph (1)(b) above (concerning the International election), the Election Officer or his representative shall determine the merits of the protest and, if found meritorious, determine the appropriate remedy.

The Election Officer or his representative shall notify the complainant(s), the Union(s) involved, any candidate(s) adversely affected, and the Administrator of his decision within the time limits prescribed above.

(5) The complainant(s), the Union(s) involved or any adversely affected candidate not satisfied with the resolution may request a hearing before the Administrator within seventy-two (72) hours after receipt of the determination. Such request shall be made in writing and shall be delivered to the Administrator or his designee and to all other parties to the dispute by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limits prescribed above, with a copy of the original protest attached.

(6) If no appeal is taken from the determination of the Election Officer or his representative, that determination shall become final and binding.

(7) Within three (3) days after receipt of a request for hearing on a protest filed under Paragraph (1)(a) above (concerning a delegate election) or within fifteen (15) days after receipt of a request for hearing on a protest filed under Paragraph (1)(b) above (concerning the International election), the Administrator or his designee shall commence and conclude a hearing at a location and in a manner that he determines most appropriate to fully illicit all relevant facts and information necessary to determine the appeal within the prescribed time period. The following individuals may be present at such hearing: the complainant(s) and/or his/her representative(s); any representative(s) of the Union(s) involved; the Election Officer or his representative; the person(s) filing the appeal, if other than the complainant(s), and/or his/her representative(s); and any other person who obtains the permission of the Administrator or his designee.

At each such hearing, the Election Officer or his representative shall present to the Administrator or his designee a summary of the original determination, including a statement of the facts found, the resolution reached and the basis for that resolution.

(8) Within three (3) days after the conclusion of a hearing on a protest filed under Paragraph (1)(a) above (concerning a delegate election) or within fifteen (15) days after the conclusion of a hearing on a protest filed under

Paragraph (1)(b) above (concerning the International election), the Administrator or his designee shall issue a written decision, making whatever findings and ordering whatever relief is appropriate to resolve the appeal. The decision must be followed unless it is stayed or overturned by the Court.

c. With respect to any protest, it shall be the burden of the complainant to present evidence that a violation has occurred.

d. No protest of any candidate, person or Union shall be considered if such candidate, person or Union, or anyone acting under their direction or control or on their behalf, caused or significantly contributed to the situation giving rise to such protest.

2. Remedies

If as a result of any protest filed or any investigation undertaken by the Election Officer with or without a protest, the Election Officer determines that these Rules have been violated or that any other conduct has occurred which may prevent or has prevented a fair, honest and open election, the Election Officer may take whatever remedial action is appropriate. Such remedial action may include, without limitation:

(a) placing or removing any nominee from the ballot;

(b) adding or removing any candidate from a slate;

(c) qualifying or disqualifying any member from seeking any delegate, alternate delegate or International Officer position;

(d) qualifying or disqualifying any member from voting;

(e) altering or rescinding intra-union discipline;

(f) reinstating or removing a member's good standing status;

(g) requiring or limiting access;

(h) requiring the Union to mail or otherwise distribute, at its own expense, candidate campaign materials;

(i) mailing or otherwise distributing candidate campaign materials;

(j) requiring the Union to hold meeting(s) and prescribing the content of such meeting(s);

(k) requiring the return of campaign contributions;

(l) requiring reimbursement for goods or services;

(m) requiring the Union to provide candidate(s) with specific goods or services;

(n) removing or replacing the Local Union election committee or any member thereof;

(o) designating or altering the method(s) for nomination or voting;

(p) designating the location or relocation of polling places or adding polling places;

(q) establishing or altering the hours for voting;

(r) establishing or altering the time(s), method(s) or location(s) for ballot counting;

(s) qualifying persons other than his representatives, and whether or not Union members, to serve as observers;

(t) disqualifying observers;

(u) ordering entry for observers and regulating the number and conduct of observers;

(v) permitting or barring any delegate from participating in the Convention nomination and/or election process;

(w) certifying or refusing to certify the results of any election;

(x) ordering the rerun of any nomination or election, or any portion thereof;

(y) conducting any nomination or election, or any portion thereof;

(z) requiring immediate compliance with these Rules, or any portion thereof.

3. Rerun Elections

Should the Election Officer refuse to certify any election, he shall then immediately order that a rerun election be held, including, if necessary, the rerunning of the nomination process. Said rerun nominations and/or elections shall be organized in consultation with the Union but shall be conducted and administered, in their entirety, by the Election Officer.

SECTIONS 7 and 8 of the National Labor Relations Act, 29 U.S.C. § 157 and 158, provide:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other manual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization of [sic] contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

SECTION 10(a) of the National Labor Management Relations Act, 29 U.S.C. § 160(a) provides:

§ 160. Prevention of unfair labor practices – Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

The Racketeering Influenced and Corrupt Organizations Act, 29 U.S.C. § 1961, 1962 and 1964 provide in pertinent part:

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping [sic], gambling,

arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1951 (relating to interference with commerce, robbery, or extortion),

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, an acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, title VII, Subtitle B, § 7033, 102 Stat. 4398.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the interstate or foreign commerce; or ordering dissolution or reorganization of any

enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The All Writs Act, 28 U.S.C. 1651(a) provides:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

No. 91-1938

In the Supreme Court of the United States

OCTOBER TERM, 1992

YELLOW FREIGHT SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree entered in this case, and the court-ordered Election Rules entered pursuant to that decree, against actions by third parties that threatened the decree.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A35) is reported at 948 F.2d 98. The district court's opinion (Pet. App. A36-A45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. On February 26, 1992, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 29, 1992 (Pet. App. A103), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. The complaint alleged that the IBT had long been under the control of organized crime and sought equitable relief to rid the union of such control. See Pet. App. A5; *United States* v. *IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. A5.

The principal goal of the settlement and the consent decree is to wrest the union from the influence of organized crime and to establish a new system of rank-and-file elections. Pet. App. A5-A6; *United States* v. *IBT*, 931 F.2d 177, 180-181 (2d Cir. 1991). Pursuant to the consent decree, the district court appointed three officers: an Independent Administrator to oversee the decree's remedial provisions; an Investigations Officer to investigate and prosecute disciplinary charges against corrupt IBT members; and an Election Officer to oversee and certify the election process. Pet. App. A5-A6, A69-A71; *United States* v. *IBT*, 941 F.2d 1292, 1294 (2d Cir. 1991), cert. denied, 112 S. Ct. 1161 (1992); *United States* v. *IBT*, 905 F.2d at 613.

The consent decree empowered the Election Officer to "supervise" the 1991 IBT election process. Pet. App. A76-A77. The district court that entered the decree determined that the Election Officer's supervisory powers include the "right to promulgate electoral rules and procedures." *United States* v. *IBT*, 723 F. Supp. 203, 207 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. 1989), 496 U.S. 925 (1990). Pursuant to that authority,

the Election Officer proposed a set of Election Rules to govern the 1991 election and submitted the Rules to the district court for approval. The district court modified the Rules and adopted them as an order of the court, declaring the Elections Rules to be the "linchpin" to the enforcement of the consent decree. *United States* v. *IBT*, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991); see also Pet. App. A49. The district court held that the court-adopted Election Rules "shall be enforceable upon pain of contempt." *United States* v. *IBT*, 742 F. Supp. at 108.

The Election Rules protect the rights of IBT members to participate in union election campaign activities. Pet. App. A104-A105. The Rules specifically state that "[n]o restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support [or] distribute leaflets or literature * * * on employer or Union premises." Pet. App. A105.[1]

2. During the 1991 IBT election campaign, petitioner Yellow Freight Systems, Inc., barred several IBT candidates who were not Yellow Freight employees from entering its facilities in Chicago Ridge, Illinois, and Detroit, Michigan, to campaign for union office. Pet. App. A7. The excluded candidates filed protests with the

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[1] The Election Rules also set out a process for expeditiously raising and adjudicating election protests. Pet. App. A105-A112. Under that process, protests concerning the election and any alleged improper or inequitable treatment of a candidate or his/her supporters must be filed with the Election Officer, and the Election Officer then determines the merits of the protest and the appropriate remedy. Pet. App. A105-A108. Any party adversely affected by a determination may seek a hearing before the Independent Administrator. If no hearing is requested, the Election Officer's determination becomes final and binding. Pet. App. A107-A108. If a hearing is requested, the Independent Administrator conducts it and thereafter issues a written decision. That decision may be appealed to the district court. Pet. App. A108-A109.

Election Officer, contending that their exclusion from the Yellow Freight premises violated the Election Rules. Pet. App. A7, A38, A85-A92. The Election Officer investigated the protests and issued an opinion holding that petitioner cannot bar a candidate from campaigning on its property unless there is a reasonable alternative means of face-to-face communication. Pet. App. A63-A64. The Election Officer concluded that access to the Chicago Ridge facility parking lot was necessary to ensure reasonable access, but that alternative means of communication were adequate at the Detroit facility. Pet. App. A59-A60, A64-A68. Accordingly, the Election Officer ordered petitioner to provide access to the parking lot, or, in the alternative, an open area outside its terminal building at the Chicago Ridge facility. Pet. App. A66-A67.

Petitioner appealed the Election Officer's rulings to the Independent Administrator, arguing that neither the Election Officer nor the Independent Administrator had jurisdiction over it. Pet. App. A48. The Independent Administrator rejected the jurisdictional challenge and affirmed the Election Officer's order. Pet. App. A49-A60.

3. Petitioner then appealed the Independent Administrator's decision to the district court. The court rejected petitioner's argument that the Election Rules could not be enforced against a non-party. The court held that under the All Writs Act, 28 U.S.C. 1651, it had authority "necessary" in aid of its jurisdiction over the IBT RICO case and the ensuing consent decree, and that it was necessary to assert such authority where an employer's actions could subvert the election provisions that are the "crux" of the decree. Pet. App. A40-A42. Further, the court noted that non-employee IBT members have a limited "pre-existing" right of access to non-employer property as guaranteed by the National

Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1). Pet. App. A42.

The district court also rejected petitioner's argument that the National Labor Relations Board (NLRB) has exclusive jurisdiction over such disputes. The court explained that the Supreme Court has recognized that certain federal labor claims that may be brought as unfair labor practice actions before the NLRB can also be asserted directly in federal court. The court held that this dispute did not fall within the NLRB's exclusive jur-isdiction because it was predicated upon the court-ordered Election Rules. Pet. App. A42-A43.

Finally, the court affirmed the decisions of the Independent Administrator and Election Officer on the merits.

4. Petitioner appealed the district court's ruling to the United States Court of Appeals for the Second Circuit. On October 29, 1991, the court of appeals issued an opinion and judgment, vacating the judgment of the district court and remanding the case for further proceedings. The court rejected petitioner's jurisdictional arguments, but held that the district court and the appointed officers did not adequately consider the alternate means available by which barred IBT campaigners might communicate with Yellow Freight employees. Judge Winter dissented on the ground that the district court lacked jurisdiction under either the All Writs Act or the consent decree to adjudicate this matter.

5. On December 31, 1991, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing in banc. Pet. App. A101-A102.

6. In January 1992, the 1991 IBT election was completed with the Election Officer's certification of the election results. Pet. App. A27.

7. On February 14, 1992, the court of appeals, *sua sponte*, issued an amended opinion.

a. The court of appeals in its amended opinion agreed that a consent decree does not ordinarily bind a non-party, but the court noted that there are exceptions to that general rule. Pet. App. A11-A12. The court explained, however, that in this case there was no need to resolve the question of whether the Consent Decree could be applied to Yellow Freight because the All Writs Act authorized the district court to issue an order requiring Yellow Freight to permit campaigning on its property. Pet. App. A12. The court pointed out that even petitioner had conceded that "the All Writs Act allows substantive injunctions against technical non-parties . . . [in at least some cases] to enforce a decree which adjudicates public rights." Pet. App. A13. The court of appeals held that the district court's protection of the IBT elections was in the public interest and that mandating limited access to employer premises for campaigning where there were no other feasible alternatives was properly deemed "necessary and appropriate" in aid of the district court's jurisdiction over the underlying RICO litigation. Pet. App. A13-A15.

b. The court further held that the procedures and review afforded to petitioner were adequate. The court stated that "[i]t is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy." Pet. App. A15-A17. Further, the court held that, as a matter of substantive law, the provision of access to Yellow Freight's Chicago Ridge facility was "agreeable to the usages and principles of law." Pet. App. A17.

c. The court rejected the argument that the NLRB had exclusive jurisdiction. The court explained that the NLRB's exclusive jurisdiction does not necessarily ex-

tend to matters where federal laws and policies other than the NLRA are implicated. The court accordingly held that this Election Rule dispute could properly be adjudicated under the Election Rules dispute mechanism. Pet. App. A18-A20. The court noted, however, that requiring "strict adherence to the requirements of federal labor law in the enforcement of the Consent Decree * * * will preclude * * * interference [with national labor policy]." Pet. App. A20.

d. On the merits, the court held that the district court, the Independent Administrator, and the Election Officer had failed to adequately examine the alternative means of communication available, and remanded the matter for further consideration. Pet. App. A20-A25. In a footnote, however, the court observed that between the time the original opinion was issued on October 29, 1991, and its amendment on February 14, 1992, this Court had decided *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), which significantly affected the law regarding access of nonemployees to an employer's property. Pet. App. A26-A27. The court of appeals stated that, because the case was now moot "in view of the completion of the 1991 election of IBT officers, we deem it unnecessary to amend [the discussion of the merits] * * *, but append this footnote simply to signal the *Lechmere* development of the law as of the amendment date of this opinion." Pet. App. A27 n.4.

e. Judge Winter again filed the same dissenting opinion that was filed with the October 29, 1991, opinion. Pet. App. A27-A35. Judge Winter noted that his dissent may now appear to be responding to arguments not raised by his colleagues. Pet. App. A34.

ARGUMENT

1. This case does not present a live case or controversy. The dispute here was whether petitioner violated

the 1991 Election Rules by barring union members who were not employed by petitioner from campaigning on its property. The Election Officer found that petitioner had violated the Election Rules with respect to its Chicago Ridge terminal and ordered petitioner to provide access to the parking lot, or, in the alternative, an open area outside its terminal building at that facility. Pet. App. A67. The district court originally affirmed that order, but the court of appeals vacated the district court's order and remanded the case. Pet. App. A26. The district court did not resolve the questions presented to it on remand and, since the elections have been held and the Election Rules no longer impose any obligation on petitioner, there is no need to resolve those issues now. Petitioner is not under any current obligation that could be affected by further review of the court of appeals' decision, and no party is arguing to the contrary. Therefore, any further proceedings would simply resolve an abstract question of law that is not embodied in a live "case or controversy" between the parties. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363 (1960).

Moreover, the petition does not present a question that is capable of repetition yet evading review. See *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1974). This case involves the effects of a unique consent decree aimed at ridding the IBT of the corrupt influence of organized crime. To accomplish that end, the parties and court agreed that the 1991 IBT election would be carried out in accordance with a particular set of procedures designed to eliminate organized crime influence over that election—the Election Rules. Now that the 1991 election is over, the Election Rules have no further effect. In short, a dispute involving the interpretation of the 1991

Election Rules or petitioner's obligation not to subvert those Rules is not "capable of repetition."[2]

Finally, even if the 1991 election had not been completed and this dispute were not moot, the court of appeals did not affirm the district court's decision, but instead vacated it and remanded the case so that the district court could make further factual determinations concerning petitioner's obligations to permit non-employees to campaign on its property. Thus, even if this case were not moot, it would come before this Court in an interlocutory posture, in which further factual findings necessary to frame the ultimate issues on the merits have not yet been made and in which neither court below has had the opportunity to address this Court's decision in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). Further review accordingly would not be war-ranted even if the case were not moot.

2. In any event, the court of appeals was correct in holding that the district court appropriately invoked its powers under the All Writs Act against an employer whose conduct could have subverted the court-ordered Election Rules and consent decree.[3] Contrary to peti-

[2] In addition, the court of appeals' decision concerning whether an employer may be required to permit non-employees to campaign for union office on its premises is likely to have little future effect even as precedent. The court itself believed that because the dispute was moot there was no need to address the effect of this Court's *Lechmere* decision on the merits of petitioner's claim that it was not required to permit non-employees to use its property to campaign for union office. See Pet. App. A26-A27. The opinion's discussion of the merits of this case will thus have little, if any, future precedential force.

[3] Petitioner contends that the court of appeals erred in holding that petitioner was bound by a consent decree to which it was not a party. Pet. 8-15. The court of appeals, however, expressly stated that it was *not* deciding whether petitioner could be bound by the Consent Decree. Pet. App. A12-A13. Instead, the issue deter-

tioner's suggestion (Pet. 21-22), the district court did not employ the Act to enforce a private agreement between the United States and the IBT. Rather, the district court invoked the Act to protect the fair and free elections that were central to achieving the goal of this RICO action: ridding the union of the influence of organized crime. Pet. App. A40-A42.

Petitioner complains that the court should not have adopted "rules for employers in their absence." Pet. 17. The district court did not, however, impose any new substantive obligations on petitioner. The court's order was designed simply to ensure that petitioner would not breach its pre-existing obligations under the NLRA and thereby subvert the election process. Pet. App. A17, A20, A42. Thus, in accord with the All Writs Act, the substantive law applied was plainly "agreeable to the usages and principles of law." Pet. App. A16. Further, petitioner cannot argue that the enforcement of the All Writs Act imposed any procedural hardship. As the court of appeals stated, "[i]t is difficult to imagine additional or different procedures that would accord Yellow Freight a significantly enhanced opportunity to present its position concerning this controversy." Pet. App. A15-A17.

Petitioner contends that the All Writs Act did not provide authority for the district court's original order in this case because the NLRB has exclusive jurisdiction over this dispute.[4] Pet. 22-29. The NLRB does not, however, have exclusive jurisdiction over matters pertaining to or necessary for the enforcement of this RICO

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mined by the court of appeals was whether the district court properly exercised its authority under the All Writs Act. Pet. App. A12-A17.

[4] This Court has recently denied certiorari in a case similarly challenging the district court's jurisdiction under the All Writs Act to enforce the Teamsters consent decree. *Star Market Co.* v. *United States*, No. 91-1674 (June 22, 1992).

consent decree or the court-ordered Election Rules. Pet. App. A18-A20. The principal case relied upon by petitioners, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is not to the contrary. Pet. 23-24. *Garmon* holds that state regulations must ordinarily yield to the NLRB's primary jurisdiction over unfair labor practice disputes. *Garmon* does not address the enforcement of independent federal rights that flow from the consent decree or the scope of a district court's power to enforce that decree under the All Writs Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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